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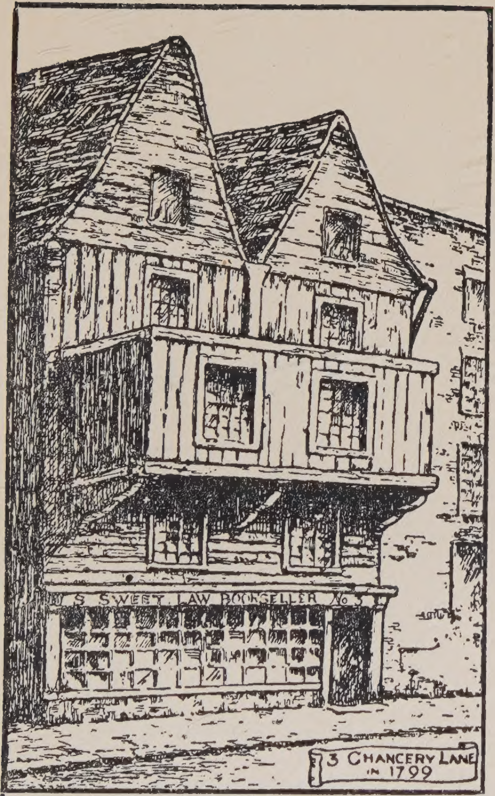
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CIVIL INJURIES.

SEVENTH EDITION (1928).

BY

SIR JOHN SALMOND

AND

P. H. WINFIELD, LL.D.

PRINCIPLES OF THE LAW OF CONTRACT

(1927).

JURISPRUDENCE

BY

SIR JOHN SALMOND,

A JUDGE OF THE SUPREME COURT OF NEW ZEALAND.

EIGHTH EDITION.

BY

C. A. W. MANNING,

M.A., B.C.L., OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW, LATE FELLOW,
TUTOR AND LECTURER IN LAW OF NEW COLLEGE, OXFORD;
CASSEL PROFESSOR OF INTERNATIONAL RELATIONS
IN THE UNIVERSITY OF LONDON.

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Dedication of Seventh Edition

To the Memory of
my Son,
WILLIAM GUTHRIE SALMOND,
A Captain in the New Zealand Army,
Who in France on the 9th day of July, 1918,
gave up his life
in the twenty-sixth year of his age.

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PREFACE

TO THE EIGHTH EDITION.

Anybody who undertakes the editing of someone else's legal treatise is faced from the first with a nice question of method, on which the room for difference of opinion is wide enough to make it unlikely that he will satisfy every taste. He will have to use his own discretion, explain to what conclusions it has led him and hope to find sympathy somewhere.

No one at any rate will doubt that the method must vary according to the character of the work itself. Suppose, for instance, the book only sets out to expound a particular body of law, such as the English law of libel, in its newest phase, the editor's task would seem to be mainly that of bringing its propositions up to date. Where on the other hand it is a statement of the considered opinion of someone no longer living, on a subject for which there seem to be no universally accepted criteria of orthodoxy, the matter is otherwise: there are more possibilities than one. Should the author's central thesis have ceased to find favour, and should the editor happen himself to carry big enough guns, he may use it as a target for some constructive shooting of his own.

In the present instance—of a book which in its existing form remains almost without a rival in public estimation—the editor has judged that his work, though delicate in detail, should be slight in total result. His plan, in the main, has been simply to draft, as though for the late author's consideration, those amendments, many of them purely verbal, to which he likes to believe that the author's approval, had it been possible to ask for it, would have been given. In those rare cases where he lets in a reflection of his own, it is so worded as not to leave its source in doubt.

In deciding as to the utility of particular changes he has been guided by his notion of the needs of "the average student." It is also by his sense of those needs that he is prompted to interpose at this point a word in regard to the type of argument that gives its general character to the book. It may easily happen that a passage so written as not too violently to disturb the thinking habits of the normal mind will by that very fact lose something of value to those readers whose goal it is, even at the cost of some mental discomfort, to arrive at a deeper understanding of the law. That which Lord Coke described as "the artificial reason and judgment of the law" is what the serious student must learn to exercise in his own behalf; and one of the functions of elementary jurisprudence is to drive this primary lesson home. Sir John Salmond, however, though differentiating neatly at the outset the analytical from the other modes of approach to the study of law, gives express reasons for not choosing himself to present an exclusively analytical treatment. Furthermore, though noticing here and there an illustration of the law's relative unconcern for "the truth of things," he seems in some other contexts implicitly to assume a necessarily close correspondence of each with the other.

A text re-written in a more pedantic spirit would not, therefore, have been a due answer to the demand for a new edition of "Salmond." It may however be useful if the student is advised fairly often to ask himself—What is it we now are discussing; is it the legal theory of modern England, or that of ancient Rome, or is it rather a point of general, or of universal, jurisprudence? Or are we now afloat upon the wide waters of the extra-legal; and, if yes, then in whose company—that of the legislator, or of the moral philosopher, or of the political scientist, or of the mere politician? The answers to these questions, when once they have been asked, ought as a rule to be perfectly plain and of an importance to justify their asking. All this, of course, is a purely personal view.

The slight verbal changes, already referred to, are scattered, without distinguishing mark, throughout the book. For this policy the editor alone is responsible. The reader who notices faults in the present edition will therefore do justly if he presumes them to be new: and the seventh edition will perhaps be at hand if he wants to make sure.

C. A. W. M.

LONDON,
October, 1930.

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JURISPRUDENCE.

INTRODUCTION.

THE SCIENCE OF JURISPRUDENCE.

§ 1. Jurisprudence as the Science of Civil Law.

In a generic and primary sense jurisprudence includes the entire body of learning in regard to law. It is *jurisprudentia*—the knowledge of law—and in this sense all law books are books of jurisprudence. By law in this connection is meant exclusively the civil law, the law of the land, as opposed to those other bodies of rules to which the name of law has been extended by analogy. If we use the term "science" in its widest permissible sense, as including the systematised knowledge of any subject of intellectual inquiry, we may define jurisprudence as the science of civil law.

Of jurisprudence in this sense there are three kinds—namely, (1) legal exposition, (2) legal history, and (3) the science of legislation. The purpose of the first is to set forth the contents of an actual legal system as existing at any time, whether past or present. The purpose of the second is to set forth the historical process whereby any legal system came to be what it is or was. The purpose of the third is to set forth not what the law is or has been, but what it ought to be. It deals not with the past or present of any legal system, but with its ideal future, and with the purposes for which it exists. The complete scientific treatment of any body of law involves the adoption of each of these three methods. The law must be dealt with systematically or dogmatically in respect of its contents, historically in respect of the process of its development, and critically in respect of its conformity with justice and the public interest. The first of these methods is that of expository or systematic jurisprudence; the second is that of legal history; while the third pertains to that branch of legal science which, for want of a better name, is commonly termed the science of legislation.

§ 2. Theoretical or General Jurisprudence.

From jurisprudence in its generic sense, as including the entire body of learning in regard to law, it is necessary to distinguish jurisprudence in a more specific sense, in which it means a particular department of such learning exclusively. In this limited significance it may be termed theoretical or general jurisprudence to distinguish it from the more practical and special departments of legal study. It is with this only that the present treatise is concerned. How, then, shall we define it; and how distinguish it from the residue of legal science? It is the science of civil law in general and of the first principles of the civil law. It is not possible, indeed, to draw any hard line of logical division between those first principles and the remaining portions of the law. The distinction is one of degree rather than of kind. Nevertheless, it is expedient to set apart, as the subject-matter of a special department of study, those more fundamental conceptions which serve as the essential raw material and those broad principles which serve as the basis and steel framework for the concrete details of the law. This introductory and general portion of legal doctrine, cut off for reasons of practical convenience from the special portions which come after it, constitutes the subject-matter of this treatise. The fact that its boundaries are not capable of being traced with logical precision detracts in no degree from the advantages to be derived from its recognition and separate treatment as a distinct department of scientific inquiry. Practical legal exposition acknowledges no call to rise to first principles, or to proceed to ultimate analysis. It takes for granted, as postulates and data, many things which it is the business of theoretical jurisprudence to inquire into. From the point of view of the application of law as an art, the importance of conceptions and principles varies inversely with their abstractness and generality. Theoretical jurisprudence, on the contrary, attributes value to the abstract and the general rather than to the concrete and the particular. Even when these two departments of knowledge are coincident in their subject-matter, they are far apart in their standpoints, methods, and purposes. The aim of the abstract study is to supply that theoretical foundation which the science of law demands, but of which the art of law is careless.

It must not be supposed that the object of this branch of legal science is an elementary outline of the concrete legal system. It deals not with the outlines of the law, but with its social context and its ultimate conceptions. Theoretical jurisprudence is not elementary law, any more than metaphysics is elementary science.

This introductory portion of legal doctrine goes by divers names. It is called theoretical jurisprudence, as being concerned with the theory of the law—that is to say, its fundamental principles and conceptions—rather than its practical and concrete details. It is also, and for the same reason, known as general jurisprudence (*jurisprudentia generalis* or *universalis*). It is also called the philosophy of law (*Rechtsphilosophie; philosophie du droit*), the term "philosophy" being here used, not in the sense of metaphysics—though it is true that much of the Continental literature of jurisprudence has a metaphysical aspect very alien to English modes of legal thought—but in the sense of an inquiry into the first principles of any department of thought. It is also known as jurisprudence *simpliciter*, without any qualifying adjective to distinguish it from the residue of legal doctrine. This specialised use of the generic term cannot be justified from the point of view of philology; but it is of practical convenience, and may be regarded as well established in modern English speech. Indeed, it would be an improvement in legal nomenclature if the term "jurisprudence" were used exclusively in this specific sense as meaning the theory or philosophy of law, the use of the term in its original and generic sense, as meaning legal learning in general, being discontinued (*a*).

§ 3. Analytical, Historical and Ethical Jurisprudence.

Jurisprudence, in its specific sense as theoretical jurisprudence or philosophy of law, is divisible into three branches, which may be distinguished as analytical, historical, and ethical. This distinction corresponds to that which has been already indicated as existing within the sphere of legal science in general—namely, the distinction

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(*a*) The term "general jurisprudence" involves the misleading suggestion that this branch of legal science is that which relates not to any single system of law, but to those conceptions and principles that are to be found in all developed legal systems, and which are therefore in this sense general. It is true that a great part of the matter with which it is concerned is common to all mature systems of law. All of these have the same essential nature and purposes, and therefore agree to a large extent in their first principles. But it is not because of universal reception that any principles pertain to the theory or philosophy of law. For this purpose such reception is neither sufficient nor necessary. Even if no system in the world save that of England recognised the legislative efficacy of judicial precedents, the theory of case-law would none the less be a fit and proper subject of general jurisprudence. *Jurisprudentia generalis* is not the study of legal systems in general, but the study of the general or fundamental elements of a particular legal system.

At the same time, however, it is also "general" in the further sense that it ordinarily opens with some more or less dogmatic assertions on the nature of civil law in general as a normal feature of organised human society.

between legal exposition, legal history, and the science of legislation. The philosophy of law, being the introductory portion of legal science in general, involves the same tripartite division. Analytical jurisprudence is the general or philosophical part of systematic legal exposition, historical jurisprudence is the general or philosophical part of legal history, and ethical jurisprudence is the general part of the science of legislation.

These three aspects of the law—dogmatic, historical, and ethical—are so involved with each other that the isolated treatment of any one of them is necessarily inadequate. A complete treatise of jurisprudence would deal fully with all three branches of the subject. In fact, however, most treatises relate primarily and essentially to one or other of them, and deal with the others only incidentally, and only so far as may be necessary to render adequate and intelligible the treatment of the central theme. It is not difficult, therefore, to classify most books of jurisprudence or legal philosophy as pertaining primarily either to the analytical, or to the historical, or to the ethical branch of the subject.

Analytical Jurisprudence.—The purpose of analytical jurisprudence is to exhibit civil law in its environment as an institution of organised human society, as well as to analyse, without reference either to their historical origin or development or to their ethical significance or validity, the first principles of the law. Since the distinction between jurisprudence and the practical exposition of a concrete legal system is merely one of degree, opinions may well differ to some extent as to the matters which deserve a place in the former department of legal science. Speaking generally, however, a book of analytical jurisprudence will deal appropriately with such subjects as the following:—

(1) An analysis of the conception of civil law;

(2) An examination of the relations between civil law and other forms of law;

(3) An analysis of the various companion ideas with which the complex idea of law is intimately bound up—for example, those of the state, of sovereignty, and of the administration of justice;

(4) An account of the legal (as opposed to the merely historical) sources from which the law proceeds, together with an investigation of the theory of legislation, judicial precedents, and customary law;

(5) An inquiry into the scientific arrangement of the law—that is to say, the logical division of the *corpus juris* into distinct departments, together with an analysis of the distinctions on which this division is based.

(6) An analysis of the conception of legal rights, together with the division of rights into various classes, and the general theory of the creation, transfer, and extinction of rights.

(7) An investigation of the theory of legal liability, civil and criminal.

(8) An examination of any other legal conceptions which, by reason of their theoretical interest, significance, or difficulty, deserve special attention from the philosophical point of view: such as property, possession, obligations, contracts, trusts, personality, incorporation, acts, causation, intention, motive, negligence, and many others.

Historical Jurisprudence—That branch of legal philosophy which is termed historical jurisprudence is the general portion of legal history. It bears much the same relation to legal history at large as analytical jurisprudence bears to the systematic exposition of the legal system. It deals in the first place with the general tendencies manifested in the origin and development of law. It deals in the second place with the origin and development of those legal conceptions and principles which are so essential in their nature as to deserve a place in the philosophy of law —the same conceptions and principles, that is to say, which are dealt with in another manner and from another point of view by analytical jurisprudence. Historical jurisprudence is the history of the first principles and conceptions of the legal system.

Ethical Jurisprudence.—Ethical jurisprudence deals with the law from the point of view of its ethical significance and adequacy. It is concerned not with the intellectual content of the legal system or with its historical development, but with the purpose for which it exists and the measure and manner in which that purpose is fulfilled. Now the purpose and end of the law may be said generally to be the maintenance of justice within a political community by means of the physical force of the State. Ethical jurisprudence is concerned, therefore, with the theory of justice in its relation to law. It is the meeting-point and common ground of moral and legal philosophy—of ethics and jurisprudence. Justice in its general aspect and relations pertains to ethics or moral philosophy. Justice in its special aspect, as the final cause of civil law, pertains to that branch of legal philosophy which we have distinguished as ethical jurisprudence.

A book of ethical jurisprudence, therefore, may concern itself with all or any of the following matters:—

(1) The conception of justice.
(2) The relation between law and justice.
(3) The manner in which law fulfils its purpose of maintaining justice.
(4) The distinction, if any such there be, between the sphere of justice as the subject-matter of law, and those other branches of right with which the law is not concerned and which pertain to morals exclusively.

(5) The ethical significance and validity of those legal conceptions and principles which are so fundamental in their nature as to be the proper subject-matter of analytical jurisprudence.

Further than this the proper scope of ethical jurisprudence does not extend. So far as any book goes beyond this general theory of justice in its relation to law, it passes over either into the sphere of moral philosophy itself, or else into the sphere of that detailed criticism of the actual legal system, or that detailed construction of an ideal legal system, which pertains not to jurisprudence or legal philosophy but to the science of legislation.

The present treatise is primarily and essentially a book of analytical jurisprudence. In this respect it endeavours to follow the main current of English legal philosophy rather than that which prevails upon the Continent of Europe, and which, to a large extent, is primarily ethical in its scope and method. But although the essential purpose of this book is an analysis of the first principles of the actual legal system, this purpose is not pursued to the total exclusion and neglect of the ethical and historical aspects of the matter. These are treated, however, as subsidiary, and are dealt with only so far as is thought necessary for the adequate treatment of the central subject-matter. A different method is doubtless possible. The writer of a book of analytical jurisprudence may say that the ethical and historical points of view are no concern of his. He may say that he is concerned exclusively with the intellectual content of the law as it actually exists, without reference to its end or purpose, the ethical quality or significance of its doctrines, or the historical process of its development. He may say that he is content to leave the history of law to the historian, and its ethical aspect to the moral philosopher. There are, indeed, some books of English jurisprudence which approach closely to this type, if they do not actually reach it. No adequate exposition, however, can so completely ignore the other branches of the subject. The total disregard of the ethical implications of the law tends to reduce analytical jurisprudence to a system of rather arid formalism; and the total disregard of historical origins and development is inconsistent with the adequate explanation of those principles and conceptions with which it is the business of this science to deal (*b*).

§ 4. English and Foreign Jurisprudence.

When an English lawyer with any knowledge of the terminology of Roman law comes to the study of a practical law-book of France or Germany he finds himself on ground not wholly unfamiliar. If, however, he ventures into the region of Continental legal philosophy, he finds himself a stranger in a strange land where men speak to him in an unknown tongue. For this divergence between the juristic thought and literature of England and that of the Continent there is more than one reason, but the most far-reaching cause of it is to be found in a certain difference in legal nomenclature. The English word "law" means law and nothing else; but the corresponding terms in Continental languages are ambiguous, and mean not only law but also right or justice. *Recht*, *droit*, and *diritto* all have this double signification. An English lawyer is helped to an understanding of this ambiguity, if he reflects that a similar double meaning is possessed in England by the term

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(*b*) What is known as comparative jurisprudence—namely, the study of the resemblances and differences between different legal systems—is not a separate branch of jurisprudence co-ordinate with the analytical, historical, and ethical, but is merely a particular method of that science in all its branches. We compare English law with Roman law either for the purpose of analytical jurisprudence, in order the better to comprehend the conceptions and principles of each of those systems; or for the purpose of historical jurisprudence, in order that we may better understand the course of development of each system; or for the purpose of ethical jurisprudence, in order that we may better judge the practical merits and demerits of each of them. Apart from such purposes the comparative study of law would be merely futile.

"equity," which means either natural justice or that particular branch of English law which was developed and applied by the Court of Chancery. The union of these two distinct though related meanings in the same words in Continental speech, while there is in general no such union in English speech, has produced important divergences between the juristic thought and literature of England and that of the Continent.

In the first place any translation of Continental jurisprudence into the English language becomes largely unintelligible if, as is usually the case, the rough-and-ready device is adopted of translating as a matter of course the terms *Recht*, *droit*, and *diritto* into the term "law." Such a version makes no distinction between those propositions which relate to law, those which relate to justice, and those which relate both to law and to justice by reference to some common element possessed or supposed to be possessed by each.

In the second place, the fact that in Continental languages law and justice are called by the same name serves on the one hand as a constant reminder of the real relation which exists between them, but tends on the other hand to create oblivion of the real distinction between them and to induce accordingly a certain confusion of thought by the identification of distinct things. In England the opposite effect is produced. On the one hand the fact that we have different words for law and justice, and cannot use the same word for both purposes, is a constant reminder that these are two different things and not the same thing. On the other hand the fact that they are never called by the same name tends to hide from view the real and intimate relation which exists between them. In other words, Continental speech conceals the difference between law and right, whereas English speech conceals the connection between them.

In the third place, and for the same reason, English jurisprudence tends naturally to assume the analytical and historical form to the exclusion of the ethical. Continental jurisprudence, on the contrary, tends naturally to assume the ethical form. In England there is readily and naturally evolved a theory of law which does not at the same time concern itself with justice. But on the Continent the theory of *Recht* and *droit* almost necessarily concerns itself with both senses of those terms and with the relation between the things so signified. The resulting predominance of the analytical method in England and of the ethical method on the Continent is a characteristic distinction between English and Continental jurisprudence in their typical forms.

Lastly, it is to be observed that Continental jurisprudence is distinguished from English not merely by its ethical, but also by its metaphysical, character. The latter quality has its source in the former, for ethics tends naturally to run into metaphysics, whereas the science of law itself is ready and willing to walk in lowlier paths.

The use of the term "jurisprudence" to denote exclusively that special branch of learning which we have termed theoretical or general jurisprudence is a peculiarity of English nomenclature. In foreign literature jurisprudence and its synonyms include the whole of legal knowledge, and are not used in this specific and limited signification.

The foreign works which correspond most accurately to the English literature of this subject are of the following kinds:—

1. Works devoted to the subject known as legal *encyclopedia*—that is to say, the general introductory treatment of the legal system, preparatory to the practical study of the *corpus juris* itself. A good example is the *Juristische Encyklopädie* of Arndts, who defines this department of legal literature as comprising "a scientific and systematic outline or general view of the whole province of jurisprudence (*Rechtswissenschaft*), together with the general

data of that science." "Its purpose," he adds, "is to determine the compass and limits of jurisprudence, its relation to other sciences, its internal divisions, and the mutual relations of its constituent parts" (*c*). Another example is Puchta's *Encyklopädie*, being the introductory portion of his *Cursus der Institutionen*, and translated by Hastie under the title of *Outlines of Jurisprudence* (1887). The *Rechts-Encyklopädie* of Gareis has been translated by Kocourek under the title of *The Science of Law* (1911) (*d*). The name "general jurisprudence" (*allgemeine Rechtslehre*) is sometimes given to this form of legal literature, as in the case of Merkel's *Elementre der allgemeinen Rechtslehre* (*e*).

2. The introductory and more general portions of books of *Pandektenrecht*—that is to say, modern Roman law. German lawyers have devoted great acumen to the analysis and exposition of the law of the Pandects in that modern form in which it was received in Germany until superseded by recent legislation. Much of the work so done bears too special a reference to the details of the Roman system to be in point with respect to the theory of English law. The more general portions, however, are admirable examples of the scientific analysis of fundamental legal conceptions. Special mention may be made of the unfinished *System of Modern Roman Law* by Savigny, and of the similar works of Windscheid and Dernburg (*f*).

3. The introductory and general portions of the systematic treatises devoted to those codes of law which in modern times have superseded Roman law throughout the Continent of Europe. The better sort of such treatises are

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(*c*) Juristische Encyklopädic und Methodologie, p. 5 (9th ed.), 1895.

(*d*) See also Bierling's Juristische Principienlehre (1894).

(*e*) Holtzendorff's Encyklopädie der Rechtswissenschaft (5th ed.), 1890.

(*f*) In 1855 Lord Lindley published, under the title of An Introduction to the Science of Jurisprudence, an annotated translation of the General Part of Thibaut's Pandektenrecht.

distinguished from the ordinary type of English law-book by a careful analysis of first principles, such as is commonly left in England to the labours of writers on theoretical jurisprudence (*g*).

4. Books of *Rechtsphilosophie* or *philosophie du droit*. All of these, however divergent *inter se* in their philosophic standpoints or their methods, are essentially and generically of one and the same nature, as contrasted with the normal type of English analytical jurisprudence. They are primarily books of ethical jurisprudence. Their central subject-matter is not, as with English jurisprudence, the theory of civil law in itself, but the theory of justice treated with special reference to the civil law. They deal primarily with *droit* or *Recht* in the sense of right (*droit naturel*, *Naturrecht*), and only in a secondary manner with *droit* or *Recht* in the sense of positive or civil law (*h*).

The history of this Continental literature of *Rechtsphilosophie* may be regarded as divided into two distinct periods. The earlier period is that of the *jurisprudentia naturalis* of the seventeenth and eighteenth centuries. The later is that in which, under the influence of Kant, jurisprudence and ethics were annexed as part of the domain of metaphysics. The earlier period is represented by such writers as Grotius, Pufendorf, Wolff, Thomasius, and Burlamaqui (*i*). This celebrated and influential litera-

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(*g*) See, for example, Gierke's Deutsches Privatrecht (1895), which contains an admirable exposition of the first principles of legal theory.

(*h*) In the words of Ahrens, a noted representative of this school of ethical and legal speculation (Cours de droit naturel ou de philosophie du droit (1st ed.), 1837, (8th ed.), 1892, vol. I., p. 1), " La philosophie du droit, ou le droit naturel, est la science qui expose les premiers principes du droit conçus par la raison et fondés dans la nature de l'homme, considérée en elle-même et dans ses rapports avec l'ordre universel des choses."

(*i*) Grotius, De Jure Belli ac Pacis, 1625; Pufendorf, De Jure Naturae et Gentium, 1672; De Officiis Hominis et Civis, 1673; Elementa Juris Universalis, 1660; Thomasius, Fundamenta Juris Naturae et Gentium, 1705; Institutiones Jurisprudentiae Divinae, 1702; Wolff, Jus Naturae, 1740-1748, 8 vols.; Burlamaqui, Principes du droit de la Nature et des Gens, 1766.

ture was devoted to the theory and principles of natural justice conceived as a body of rules authoritatively laid down as natural law (*lex naturae*), just as civil justice consists of the rules authoritatively imposed through civil law. The commencement of the second and metaphysical period in the history of the Continental philosophy of law may be regarded with sufficient accuracy as commencing with the publication in 1796 of Kant's *Metaphysical First Principles of Jurisprudence* (*k*). Since that date there has developed on the Continent a literature of this subject, formidable both in bulk and character. It is represented by typical examples translated and published in America by the Association of American Law Schools under the title of *The Modern Legal Philosophy Series*. An historical and critical account of it is to be found in one of the volumes of that series, being a translation of a work of Berolzheimer under the title of *The World's Legal Philosophies*. Notable examples, contained in the same series, of this type of ethical-juristic speculation are *The General Theory of Law*, by Korkunov, and *The Philosophy of Law*, by Kohler. Most of this literature is remote from the main current of English legal thought. It is for the most part so far devoted to metaphysics rather than to science, and to ethics rather than to law, and condescends so little to the facts of the concrete legal system, as to have little direct bearing on the task and problems to which the traditional jurisprudence of England has been devoted. *Rechtsphilosophie* of this type, however, is not wholly unrepresented even in English literature. A notable example is the work of Lorimer called *The Institutes of Law—a Treatise of the Principles of Jurisprudence as determined by Nature*, of which a second edition was published in 1880 (*l*).

(*k*) Metaphysische Anfangsgründe der Rechtslehre; translated by Hastie under the title of The Philosophy of Law, 1887.

(*l*) Other English examples are :—Lectures on the Philosophy of Law, by Miller, 1884; An Outline of Legal Philosophy, by Watt, 1893; Lectures

On the other hand, the earlier Continental literature of natural law in the seventeenth and eighteenth centuries may fairly be regarded as one of the sources from which, in the nineteenth century, English analytical jurisprudence was derived. The theory of natural law and natural justice, as developed by Pufendorf and others of that school, is so connected with the theory of civil law and civil justice that *jurisprudentia naturalis* of this type is readily transmuted into *jurisprudentia civilis*. Indeed the very term *jurisprudentia generalis* or *universalis*, by which English analytical jurisprudence is distinguished, was originally a synonym of *jurisprudentia naturalis* itself (*m*).

The main current of modern English analytical jurisprudence may be said to have its source in the work of John Austin, who occupied the chair of Jurisprudence in the then recently established University of London, and who published in 1832 a work entitled *The Province of Jurisprudence Determined*. After his death this book was incorporated in a larger work including his unpublished manuscripts, and entitled *Lectures on Jurisprudence, or the Philosophy of Positive Law* (1863). In this work Austin definitely departs from the earlier tradition of *jurisprudentia naturalis* and accepts the first principles of the civil law itself as the proper subject of scientific or philosophical investigation (*n*), (*o*), (*p*).

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on the Philosophy of Law, by Stirling, 1873; The Theory of Law and Civil Society, by Pulszky, 1888.

(*m*) One of the last examples in England of the literature of natural jurisprudence, in order that we may better understand the course of develop- of Universal Jurisprudence, by John Penford Thomas, of Queens' College, Cambridge, of which a second edition appeared in 1829. It expounds the first principles of the law of nature, the civil law, and the law of nations. The traditional doctrine of natural law in the form received from Aquinas and the Schoolmen is still the subject of modern literature within the Roman Catholic Church. An excellent example is the work entitled Moral Philosophy or Ethics and Natural Law, by Joseph Rickaby (3rd ed.), 1892.

(*n*) The doctrine so established by Austin of a science of analytical

(*o*) (*p*) See notes (*o*) (*p*), p. 16.

jurisprudence distinct from historical or ethical jurisprudence has been followed since his day by a series of English writers, including the following: Markby, Elements of Law (6th ed.), 1905; Holland, Elements of Jurisprudence (12th ed.), 1916; Hearn, The Theory of Legal Duties and Rights, 1883; Amos, The Science of Jurisprudence, 1872; Lightwood, The Nature of Positive Law, 1883; Rattigan, The Science of Jurisprudence (2nd ed.), 1891; Sir Frederick Pollock, First Book of Jurisprudence (5th ed.), 1923; Gray, The Nature and Sources of the Law, 1909; Terry, Leading Principles of Anglo-American Law, 1884; Goadby, Introduction to the Study of Law (3rd ed.), 1921; Brown, The Austinian Theory of Law, 1906.

(*o*) A good account of the various schools of jurisprudence is to be found in a series of articles by Professor Roscoe Pound in the Harvard Law Review: The Scope and Purpose of Sociological Jurisprudence, H. L. R., vol. 24, p. 591; vol. 25, p. 140 and p. 489. See also the same writer's Introduction to the Philosophy of Law (1922), and Sir Paul Vinogradoff's Outlines of Historical Jurisprudence (1920), vol. I., Introduction.

(*p*) In the text I have dealt with jurisprudence as the science of civil law exclusively. But just as the term "law" has been extended by analogy to include other bodies of rules than the civil law, so the term "jurisprudence" has suffered a similar analogical extension, though in a smaller degree. Being *jurisprudentia*—the knowledge of *jus*—it may be regarded as including any form of law in the sense of *jus*. Thus, we may speak of international jurisprudence dealing with the *jus gentium*, as well as of civil jurisprudence dealing with the *jus civile*. It is more usual, however, and more conducive to accuracy of thought and speech, to disregard all such analogical extensions of this term, and to confine jurisprudence to the science or doctrine of the civil law alone.

BOOK I.

THE NATURE AND SOURCES OF LAW.

CHAPTER I.

THE KINDS OF LAW.

§ 5. Law in General.

In its widest sense the term law includes any rule of action; that is to say, any standard or pattern to which actions (whether the acts of rational agents or the operations of nature) are or ought to be conformed. In the words of Hooker (*a*): " We term any kind of rule or canon whereby actions are framed a law." So Blackstone says (*b*): " Law in its most general and comprehensive sense signifies a rule of action, and is applied indiscriminately to all kinds of action whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics or mechanics, as well as the laws of nature and of nations."

Of law in this sense there are many kinds, and the following are sufficiently important and distinct to deserve separate mention and examination: (1) Imperative law; (2) Physical or Scientific law; (3) Natural or Moral law; (4) Conventional law; (5) Customary law; (6) Practical or Technical law; (7) International law or the law of Nations; (8) Civil law or the law of the state.

Before proceeding to analyse and distinguish these, there are the following introductory observations to be made:—

(1) This list is not based on any logical scheme of division or classification, but is a mere *simplex enumeratio* of the chief forms of law in the widest sense of that term.

(2) There is nothing to prevent the same rule from belonging to more than one of those classes. The same rule may possess more than one aspect or quality, by virtue of which it may belong concurrently to more than one species of law.

(*a*) Ecclesiastical Polity, I, 3, 1.
(*b*) Comm. I. 38.

(3) It may be that some of those classes are merely subspecies of some other class. It is, for example, a widely received opinion that civil law is merely a particular kind of imperative law. So, also, international law is regarded variously by different authorities as a kind of conventional law or as a kind of customary law. However this may be, it is convenient to classify those forms of law as co-ordinate with the others, partly on account of their special importance, and partly because of the fact that opinions differ as to the generic form to which they really belong.

(4) Any discussion as to the rightful claims of any of those classes of rules to be called laws—any attempt to distinguish laws properly so called from laws improperly so called—would seem to be nothing more than a purposeless dispute about words. Our business is to recognise that they are in fact called laws, and to distinguish accurately between the different classes of rules that are thus known by the same name.

We proceed, accordingly, to deal briefly with each class in its order.

§ 6. Imperative Law.

Imperative law means a rule of action imposed upon men by some authority which enforces obedience to it. In other words, an imperative law is a command which prescribes some general course of action, and which is imposed and enforced by some superior power. The instrument of such enforcement is not necessarily physical force, but may consist in any other form of constraint or compulsion by which the actions of men may be determined. In the words of Pufendorf (*c*): Lex est decretum quo superior sibi subjectum obligat, ut ad istius praescriptum actiones suas componat. "A law," says Austin (*d*), "is a command which obliges a person or persons to a course of conduct." A law in this sense therefore possesses two essential attributes. The first of these is generality. A command, in order to amount to a law, must assume the form of a general rule; a particular

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(*c*) De Officiis Hominis et Civis, I, 2, 2.
(*d*) Jurisprudence, I, 96.

command, requiring obedience in the individual instance merely, does not possess the essential characteristic of a law. The second requisite is enforcement by authority. A rule the observance of which is left to the good pleasure of those for whom it is laid down, is not a law in this sense.

Every organised community or society of men tends to develop imperative laws formulated by the governing authority of that community or society for the control of its members with intent to secure the purposes for which it exists. The state makes laws of this kind for its citizens for the purpose of securing peace, order, and good government within its territories. In the same way other forms of imperative law are developed within a church, an army, a school, a family, a ship's company, a social club, and any other institution so organised as to possess a governing body capable of imposing its will upon the members. Even in the absence of such a definite organisation, rules of conduct which are approved by the public opinion of the society, and the breach of which is visited by public censure, are regarded and spoken of as imperative laws imposed by the unorganised society upon its members. In this sense and in this aspect the rules of morality recognised by public opinion in any community are imperative laws standing side by side with the civil law of the state and fulfilling the same purposes. Law of this kind—the law of opinion or of reputation, as Locke (*e*) calls it—is commonly known as positive morality—the epithet positive being used to distinguish morality of this kind, so recognised and enforced by the public opinion of the community, from those ideal or absolute rules of right and wrong which are derived from reason and nature and are independent of recognition and acceptance by any human society. Rules of the latter kind constitute natural morality, as opposed to positive morality. The positive morality of a particular com-

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(*e*) "The laws that men generally refer their actions to, to judge of their rectitude or obliquity, seem to me to be these three: 1. The Divine Law; 2. The civil law; 3. The law of opinion or reputation, if I may so call it. By the relation they bear to the first of these, men judge whether their actions are sins or duties; by the second, whether they be criminal or innocent; and by the third, whether they be virtues or vices." Locke on the Human Understanding, Bk. II. ch. 28, § 7.

munity may approve of polygamy or infanticide, while natural or ideal morality may disapprove of both.

Just as an individual state develops within itself a system of imperative law imposed by it upon its members, so the society of states develops a system of imperative law for the regulation of the conduct of those states towards each other. The law of nations or international law consists, in part at least and in one aspect, of rules imposed upon states by the society of states, and enforced partly by international opinion and partly by the threat of war.

Many writers are content to classify the civil law—the law of the state—as being essentially, and throughout its whole compass, nothing more than a particular form of imperative law. They consider it a sufficient analysis and definition of civil law to say that it consists of the general commands issued by the state to its subjects, and enforced, if necessary, by the physical power of the state. This may be termed the imperative, or, more accurately, the purely imperative, theory of civil law. "The civil laws," says Hobbes (*f*), "are the command of him who is endued with supreme power in the city" (that is to say, the state, *civitas*) "concerning the future actions of his subjects." Similar opinions are expressed by Bentham (*g*), and by Austin (*h*), and have been widely, though by no means universally, accepted by English writers. We shall have occasion later to consider fully this view as to the nature of civil law. It is sufficient to indicate here that though it falls short of an adequate analysis, it undoubtedly expresses a very important aspect of the truth. It rightly emphasises the central fact that the civil law is based on the will and physical force of the organised political community. Such law exists only as an incident of the administration of justice by the state, and this consists essentially in the imperative and coercive action of the state in imposing its will, by force if need be, upon the members of the body politic. "It is men and arms," says Hobbes (*i*), "that make the force and power

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(*f*) English Works, II. 185.

(*g*) Principles of Morals and Legislation, p. 330, Clarendon Press Ed.; Works, I. 151.

(*h*) Jurisprudence, Lecture 1

(*i*) Leviathan, ch. 46.

of the laws." The civil law has its sole source, not in consent, or in custom, or in reason, but in the will and the power of him who in a commonwealth beareth not the sword in vain. In what respects this doctrine represents not the whole truth but merely one part and aspect of it, we shall consider at large and more appropriately at a later stage of this inquiry.

The instrument of coercion by which any system of imperative law is enforced is called a sanction, and any rule so enforced is said to be sanctioned. Thus physical force in the various methods of its application is the sanction applied by the state in the administration of justice. Censure, ridicule, and contempt are the sanctions by which society (as distinguished from the state) enforces the rules of positive morality. War is the last and most formidable of the sanctions which in the society of nations maintains the law of nations. Threatenings of evils to flow here or hereafter from Divine anger are the sanctions of religion, so far as religion assumes the form of a regulative or coercive system of imperative law (*k*).

A sanction is not necessarily a punishment or penalty. To punish law-breakers is an effective way of maintaining the law, but it is not the only way. The state enforces the law not only by imprisoning the thief, but by depriving him of his plunder and restoring it to the true owner; and each of these applications of the physical force of the state is equally a sanction. An examination and classification of the different forms of sanction by which the civil law is maintained will claim our attention later.

§ 7. Physical or Scientific Law.

Physical laws or the laws of science are expressions of the uniformities of nature—general principles expressing the regularity and harmony observable in the activities and opera-

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(*k*) The term "sanction" is derived from Roman law. The *sanctio* was originally that part of a statute which established a penalty or made other provisions for its enforcement. Legum eas partes, quibus pœnas, constituimus adversus eos qui contra leges fecerint, sanctiones vocamus, Just. Inst. 2. 1. 10. Sanctum est, quod ab injuria hominum defensum atque munitum est. D. 1. 8. 8. By an easy transition the term "sanction" has come to denote the penalty itself.

tions of the universe. It is in this sense that we speak of the law of gravitation, the laws of the tides, or the laws of chemical combination. Even the actions of human beings, so far as they are uniform, are the subject of law of this description: as, for example, when we speak of the laws of political economy. These are rules expressing not what men ought to do, but what they do.

Physical laws are also, and more commonly, called natural laws, or the laws of nature; but these latter terms are ambiguous, for they signify also the moral law; that is to say, the principles of natural right and wrong.

This use of the term "law" to connote nothing more than uniformity of action is derived from law in the sense of an *imperative* rule of action, by way of the theological conception of the universe as governed in all its operations (animate and inanimate, rational and irrational) by the will and command of God. The primary source of this conception is to be found in the Hebrew scriptures, and its secondary and immediate source in the scholasticism of the Middle Ages—a system of thought which was formed by a combination of the theology of the Hebrews with the philosophy of the Greeks. The Bible constantly speaks of the Deity as governing the universe, animate and inanimate, just as a ruler governs a society of men; and the order of the world is conceived as due to the obedience of all created things to the will and commands of their Creator. "He gave to the sea his decree, that the waters should not pass his commandment" (*l*). "He made a decree for the rain, and a way for the lightning of the thunder" (*m*). The Schoolmen made this same conception one of the first principles of their philosophic system. The *lex aeterna*, according to St. Thomas Aquinas, is the ordinance of the Divine wisdom, by which all things in heaven and earth are governed. "There is a certain eternal law, to wit, reason, existing in the mind of God and governing the whole universe. . . . For law is nothing else than the dictate of the practical reason in the ruler who governs a perfect community" (*n*). "Just as

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(*l*) Proverbs, 8. 29.
(*m*) Job, 28. 26.
(*n*) Summa, 1. 2. q. 91. art. 1.

the reason of the Divine wisdom, inasmuch as by it all things were created, has the nature of a type or idea; so also, inasmuch as by this reason all things are directed to their proper ends, it may be said to have the nature of an eternal law. . . . And accordingly the law eternal is nothing else than the reason of the Divine wisdom regarded as regulative and directive of all actions and motions" (*o*).

This *lex aeterna* was divided by the Schoolmen into two parts. One of these was that which governed the actions of men: this is the moral law, the law of nature, or of reason. The other is that which governs the actions of all other created things: this is that which we now term physical law, or natural law in the modern and prevalent sense of that ambiguous term (*p*). This latter branch of the eternal law is perfectly and uniformly obeyed; for the irrational agents on which it is imposed can do no otherwise than obey the dictates of the Divine will. But the former branch—the moral law of reason—is obeyed only partially and imperfectly; for man by reason of his prerogative of freedom may turn aside from that will to follow his own desires. Physical law, therefore, is an expression of actions as they actually are; moral law, or the law of reason, is an expression of actions as they ought to be.

This scholastic theory of law finds eloquent expression in the writing of Hooker in the sixteenth century. "His commanding those things to be which are, and to be in such sort as they are, to keep that tenure and course which they do, importeth the establishment of nature's law. . . . Since the time that God did first proclaim the edicts of his law upon it, heaven and earth have hearkened unto his voice, and their labour hath been to do his will. . . . See we not plainly that the obedience of creatures unto the law of nature is the stay of the whole world" (*q*). "Of law there can be no less acknowledged, than that her seat is the bosom of God,

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(*o*) Summa, 1. 2. q. 93. art. 1.

(*p*) Natural law, *lex naturae*, is either (1) the law of *human* nature, *i.e.*, the moral law, or (2) the law of nature in the sense of the universe, *i.e.*, physical law.

(*q*) Ecc. Pol. I. 3. 2.

her voice the harmony of the world, all things in heaven and earth do her homage" (*r*).

The modern use of the term law, in the sense of physical or natural law, to indicate the uniformities of nature, is directly derived from this scholastic theory of the *lex aeterna*; but the theological conception of Divine legislation on which it was originally based is now eliminated or disregarded. The relation between the physical law of inanimate nature and the moral or civil laws by which men are ruled has been reduced accordingly to one of remote analogy.

§ 8. Natural or Moral Law.

By natural or moral law is meant the principles of natural right and wrong—the principles of natural justice, if we use the term justice in its widest sense to include all forms of rightful action. Right or justice is of two kinds, distinguished as natural and positive. Natural justice is justice as it is in deed and in truth—in its perfect idea. Positive justice is justice as it is conceived, recognised, and expressed, more or less incompletely and inaccurately, by the civil or some other form of human and positive law. Just as positive law, therefore, is the expression of positive justice, so philosophers have recognised a natural law, which is the expression of natural justice (*s*).

This distinction between natural and positive justice, together with the corresponding and derivative distinction between natural and positive law, comes to us from Greek philosophy. Natural justice is φυσικὸν δίκαιον; positive justice is νομικὸν δίκαιον; and the natural law which expresses the principles of natural justice is φυσικὸς νόμος. When Greek philosophy passed from Athens to Rome, φυσικὸν δίκαιον appeared there as *justitia naturalis* and φυσικὸς νόμος as *lex naturae* or *jus naturale*.

This natural law was conceived by the Greeks as a body of imperative rules imposed upon mankind by Nature, the per-

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(*r*) Ecc. Pol. I. 16. 8.

(*s*) The term "positive" in this usage means established (*positum*) by some form of human authority. As to the term positive law see section 14, *infra*.

sonified universe. The Stoics, more particularly, thought of Nature or the Universe as a living organism, of which the material world was the body, and of which the Deity or the Universal Reason was the pervading, animating, and governing soul; and natural law was the rule of conduct laid down by this Universal Reason for the direction of mankind.

Natural law has received many other names expressive of its divers qualities and aspects. It is Divine Law (*jus divinum*)—the command of God imposed upon men—this aspect of it being recognised in the pantheism of the Stoics, and coming into the forefront of the conception so soon as natural law obtained a place in the philosophical system of Christian writers. Natural law is also the Law of Reason, as being established by that Reason by which the world is governed, and also as being addressed to and perceived by the rational nature of man. It is also the Unwritten Law (*jus non scriptum*), as being written not on brazen tablets or on pillars of stone, but solely by the finger of nature in the hearts of men. It is also the Universal or Common Law (κοινος νόμος, *jus commune, jus gentium*), as being of universal validity, the same in all places and binding on all peoples, and not one thing at Athens and another at Rome, as are the civil laws of states (ἴδος νόμος, *jus civile*). It is also the Eternal Law (*lex aeterna*), as having existed from the commencement of the world, uncreated and immutable. Lastly, in modern times we find it termed the Moral Law, as being the expression of the principles of morality.

The term natural law, in the sense with which we are here concerned, is now fallen almost wholly out of use. We speak of the principles of natural justice, or of the rules of natural morality, but seldom of the law of nature, and for this departure from the established usage of ancient and medieval speech there are at least two reasons. The first is that the term natural law has become equivocal; for it is now used to signify physical law—the expression of the uniformities of nature. The second is that the term law, as applied to the principles of natural justice, brings with it certain misleading associations—suggestions of command, imposition, external authority, legislation—which are not in harmony with the moral philosophy of the present day.

The following quotations illustrate sufficiently the ancient and medieval conceptions of the law of nature:—

Aristotle.—"Law is either universal (κοινος νόμος) or special (ἴδιος νόμος). Special law consists of the written enactments by which men are governed. The universal law consists of those unwritten rules which are recognised among all men" (*t*) "Right and wrong have been defined by reference to two kinds of law. . . . Special law is that which is established by each people for itself. . . . The universal law is that which is conformable merely to Nature" (*u*).

Cicero.—"There is indeed a true law (*lex*), right reason, agreeing with nature, diffused among all men, unchanging, everlasting. . . . It is not allowable to alter this law, nor to derogate from it, nor can it be repealed. We cannot be released from this law, either by the praetor or by the people, nor is any person required to explain or interpret it. Nor is it one law at Rome and another at Athens, one law to-day and another hereafter; but the same law, everlasting and unchangeable, will bind all nations at all times; and there will be one common lord and ruler of all, even God the framer and proposer of this law" (*x*).

Philo Judaeus.—"The unerring law is right reason; not an ordinance made by this or that mortal, a corruptible and perishable law, a lifeless law written on lifeless parchment, or engraved on lifeless columns; but one imperishable, and impressed by immortal Nature on the immortal mind" (*y*).

Gaius.—"All peoples that are ruled by laws and customs observe partly law peculiar to themselves and partly law common to all mankind. That which any people has established for itself is called *jus civile*, as being law peculiar to that State (*jus proprium civitatis*). But that law which natural reason establishes among all mankind is observed equally by all peoples, and is for that reason called *jus gentium*" (*z*).

Justinian.—"Natural law (*jura naturalia*), which is observed equally in all nations, being established by divine providence, remains for ever settled and immutable; but that law which each State has established for itself is often changed, either by legislation or by the tacit consent of the people" (*a*).

(*t*) Rhet. I. 10.

(*u*) Rhet. I. 13.

(*x*) De Rep. III. 22. 23.

(*y*) Works, III. 516 (Bohn's Ecc. Library). On the Virtuous being also Free.

(*z*) Institutes, I. 1.

(*a*) Institutes, I. 2. 11.

Hooker.—"The law of reason or human nature is that which men by discourse of natural reason have rightly found out themselves to be all for ever bound unto in their actions" (*b*).

Christian Thomasius.—"Natural law is a divine law, written in the hearts of all men, obliging them to do those things which are necessarily consonant to the rational nature of mankind, and to refrain from those things which are repugnant to it" (*c*).

THE JUS GENTIUM OF THE ROMAN LAWYERS.

It is a commonly received opinion, that *jus gentium*, although identified as early as the time of Cicero with the *jus naturale* of the Greeks, was in its origin and primary signification something quite distinct—a product not of Greek philosophy but of Roman law. It is alleged that *jus gentium* meant originally that system of civil and positive law which was administered in Rome to aliens (*peregrini*), as opposed to the system which was the exclusive birthright and privilege of Roman citizens (*jus civile* or *jus quiritium*); that this *jus gentium*, being later in date than the *jus civile*, was so much more reasonable and perfect that it came to be identified with the law of reason itself, the *jus naturale* of the Greeks, and so acquired a double meaning, (1) *jus gentium*, viz. *jus naturale*, and (2) *jus gentium*, viz. that part of the positive law of Rome which was applicable to aliens, and not merely to citizens. That the term *jus gentium* did possess this double meaning cannot be doubted; but it may be gravely doubted whether the true explanation of the fact is that which has just been set forth. It would seem more probable that *jus gentium* was in its very origin synonymous with *jus naturale*—a philosophical or ethical, and not a technical legal term—the Roman equivalent of the κοινος νόμος of Aristotle and the Greeks; and that the technical significance of the term is secondary and derivative. *Jus gentium* came to mean not only the law of nature—the principles of natural justice—but also a particular part of the positive law of Rome, namely, that part which was derived from and in harmony with those principles of natural justice, and which therefore was applicable in Roman law courts to all men equally, whether *cives* or *peregrini*. In the same way in England, the term equity, although originally purely ethical and the mere equivalent of natural justice or *jus naturae*, acquired a secondary, derivative, and technical use to signify a particular portion of the civil law of England, namely, that portion which was administered in the Court of Chancery, and which was called equity because derived from equity in the original ethical sense.

(*b*) Ecc. Pol. I. 1. 10. 1.

(*c*) Inst. Jurisp. Div. I. 2. 97.

This, however, is not the place in which to enter into any detailed examination of this very interesting and difficult problem in the history of human ideas (*d*).

§ 9. Conventional Law.

By conventional law is meant any rule or system of rules agreed upon by persons for the regulation of their conduct towards each other. Agreement is a law for the parties to it. Examples are the rules and regulations of a club or other voluntary society, and the laws of cricket, golf, or any other game. The laws of chess, for example, are the rules which the players have expressly or tacitly agreed to observe in their conduct of the game.

In many cases conventional law is also civil law; for the rules which persons by mutual agreement lay down for themselves are often enforced by the courts of justice of a state. But whether or not these conventional rules thus receive recognition and enforcement as part of the civil law, they constitute law in the generic sense of a rule of human action. That part of civil law which has its source in agreement may itself be termed conventional law—for example the regulations of an incorporated company—but such a use of the term must be distinguished from that which is here under consideration. Conventional law in the present sense is not a part of the civil law, but a different kind of law.

The most important branch of conventional law is the law of nations, which, as we shall see later, consists essentially, and in its most important aspect, of the rules which have been expressly or impliedly agreed upon by states as governing their conduct and relations to each other.

§ 10. Customary Law.

By customary law is here meant any rule of action which is actually observed by men—any rule which is the expression

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(*d*) See Nettleship, Contributions to Latin Lexicography, *sub. voc. jus gentium*; Burle, Essai historique sur le développement de la notion du droit naturel dans l'antiquité grecque; Phillipson, The International Law and Custom of Ancient Greece and Rome, vol. I. ch. 3; Bryce, Studies in History and Jurisprudence I. pp. 112-171; Pollock, Journ. Compar. Legisl. 1900, p. 418; 1901, p. 204; Clark, Practical Jurisprudence, ch. 13.

of some actual uniformity of voluntary action. Custom is a law for those who observe it—a law or rule which they have set for themselves and to which they voluntarily conform their actions. Of this nature are the laws of dress, deportment, and etiquette. It is true that custom is very often obligatory—that is to say, its observance is very often enforced by some form of imperative law, whether the civil law or the law of positive morality; but irrespective of any such enforcement, and by reason solely of its *de facto* observance, it is itself a law in that generic sense in which law includes any rule of action.

The operation of custom as one of the sources of civil law will be considered later. That portion of the civil law which has its source in custom is itself called customary law, but it is not in this sense that the term is here used. Customary law in the present sense is not a part of civil law, but a different kind of law in the generic sense.

§ 11. Practical or Technical Law.

Yet another kind of law is that which consists of rules for the attainment of some practical end, and which, for want of a better name, we may term practical or technical law. These laws are the rules which guide us to the fulfilment of our purposes; which inform us as to what we ought to do, or must do, in order to attain a certain end. Examples of such are the laws of health, the laws of musical and poetical composition, the laws of style, the laws of architecture, and the rules for the efficient conduct of any art or business. The laws of a game are of two kinds—some are conventional, being the rules agreed upon by the players; others are practical or technical, being the rules for the successful playing of the game.

§ 12. International Law.

International law, or the law of nations, consists of those rules which govern, or are officially discussed as governing, sovereign states in their relations and conduct towards each other. All men agree that such a body of law exists, and that states do in fact act in obedience to it; but when we come to inquire what is the essential nature and source of this law, we find in the writings of those who deal with it a very curious absence of definiteness and unanimity. The opinion which we shall here adopt as correct, is that the law of nations is essentially a species of *conventional* law; that it has its source in international agreement; that it consists of the rules which sovereign states have agreed to observe in their dealings with each other.

This law has been defined by Lord Russell of Killowen (*e*) as " the aggregate of the rules to which nations have agreed to conform in their conduct towards one another." " The law of nations," says Lord Chief Justice Coleridge (*f*), " is that collection of usages which civilised states have agreed to observe in their dealings with each other." " The authorities seem to me," says Lord Esher (*g*), " to make it clear that the consent of nations is requisite to make any proposition part of the law of nations." " To be binding," says Lord Cockburn (*h*), " the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of Governments, or may be implied from established usage."

The international agreement which thus makes international law is of two kinds, being either express or implied. Express agreement is contained in treaties and international conventions, such as the Declaration of Paris or the Covenant of the League of Nations. Implied agreement is evidenced chiefly by the custom or practice of states. By observing certain rules of conduct in the past, states have impliedly agreed to abide by them in the future. By claiming the observance of such customs from other states, they have impliedly agreed to be bound by them themselves. International law derived from express agreement is called in a narrow sense the conventional law of nations, although in a wider sense the whole of that law is conventional; that part which is based on implied agreement is called the customary law of nations. The tendency of

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(*e*) L. Q. R. 12, p. 313. Adopted by Lord Alverstone, C.J., in *West Rand Gold Mining Co.* v. *Rex*, [1905] 2 K. B., at p. 407.

(*f*) *Reg.* v. *Keyn*, 2 Ex. D. p. 63.

(*g*) *Reg.* v. *Keyn*, 2 Ex. D. p. 131.

(*h*) *Reg.* v. *Keyn*, 2 Ex. D. p. 202.

historical development is for the whole body of the law to be reduced to the first of these two forms—to be codified and expressed in the form of an international convention, to which all civilised states have given their express consent. Just as customary civil law tends to be absorbed in enacted law, so customary international law tends to be merged in treaty law.

International law is further divisible into two kinds, which may be distinguished as the common law of nations and the particular law of nations. The common law is that which prevails universally, or at least generally, among all civilised states, being based on their unanimous or general agreement, express or implied. The particular law is that which is in force solely between two or more states, by virtue of an agreement made between them alone, and derogating from the common law.

International law exists only between those states which have expressly or impliedly agreed to observe it. Those states (which now include all civilised communities, and some which are as yet only imperfectly civilised) are said to constitute the family or society of nations—an international society governed by the law of nations, just as each national society is governed by its own civil law. New states are received into this society by mutual agreement, and thereby obtain the rights and become subject to the duties created and imposed by international law (*i*).

§ 13. Civil Law.

Finally, we come to the consideration of that kind of law which is the special subject-matter of this treatise. This is the civil law, the law of the state or of the land, the law of lawyers and the law courts. This is law in the strictest and original sense of the term, all other applications of the term being derived from this by analogical extension. In the absence of any indication in the context of a different intention, the term law, when used *simpliciter*, means civil law and nothing else, and in this sense the term is used in future throughout this book.

(*i*) The nature of international law is more fully discussed in Appendix VI.

The question of the true nature of civil law is one of so much difficulty and importance that it must be reserved for detailed consideration in the following chapter.

SUMMARY.

Law in its most general sense—any rule of action.

Kinds of law in this sense:

1. Imperative law. Rules of action imposed on men by authority.
    - The imperative theory of civil law—partially true but incomplete and one-sided.
    - The sanctions of imperative law.
2. Physical or scientific law.
    - Rules formulating the uniformities of nature.
    - This conception of law derived from scholastic philosophy.
    - The *lex aeterna*.
3. Natural or moral law.
    - Rules formulating the principles of natural justice.
    - This conception of law derived from Greek philosophy and Roman law.
    - Two meanings of natural law:
        - (a) Scientific or physical law.
        - (b) Moral law.
    - The *jus gentium* of the Romans.
4. Conventional law—rules agreed upon by persons for the regulation of their conduct towards each other.
5. Customary law—rules of action embodied in custom.
6. Practical or technical law—rules of action for the attainment of practical ends.
7. International law—the rules which govern sovereign states in their relations towards each other.
8. Civil law—the law of the state as applied in the state's courts of justice.

CHAPTER II.

CIVIL LAW.

§ 14. The Term Law.

The name civil law, though now fallen somewhat out of use in this sense, and though possessing certain other meanings, is the most proper and convenient title by which to distinguish the law of the land from other forms of law. Such law is termed civil, as being that of the *civitas* or state. The name is derived from the *jus civile* of the Romans. "Quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est, vocaturque jus civile, quasi jus proprium ipsius civitatis" (*a*).

The other meanings of civil law are not such as to be likely to create confusion. It often means the law of Rome (*corpus juris civilis*) as opposed to the canon law (*corpus juris canonici*) —these being the two systems by which, in the Middle Ages, the state and the Church were respectively governed—or as opposed to the law of England, inasmuch as England, unlike the rest of Europe, refused to receive the Roman law and developed a system of its own. The term civil law is also used to signify, not the whole law of the land, but only the residue of it after deducting some particular portion having a special title of its own. Thus, civil law is opposed to criminal law or to military law.

The term civil law, as indicating the law of the land, has been partially superseded in recent times by the improper substitute, *positive* law. *Jus positivum* was a title invented by medieval jurists to denote law made or established (*positum*) by human authority, as opposed to the *jus naturale*, which was uncreated and immutable. It is from this contrast that the term positive derives all its point and significance. It is not permissible, therefore, to confine positive law to the

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(*a*) Just. Inst. I. 2. 1

law of the land. All law is positive that is not natural. International law, for example, if assumed to rest upon human authority, is a kind of *jus positivum*, no less than the civil law itself (*b*).

Where the stress is on the distinction between the law of the land and international law, the former is commonly spoken of as municipal, rather than as civil, law (*c*). This usage, of course, is somewhat inconvenient, having regard to the modern connotation of the adjective municipal as relating to a municipality or borough. Its use as a synonym of civil is derived from *municipium* in the sense of a self-governing political community within the Roman Empire. *Civitas* and *municipium* were closely related in meaning and use. Both terms denoted a body politic or state. The name civil law is derived from one of them, and the name municipal law from the other.

The term law is used in two senses, which may be conveniently distinguished as the abstract and the concrete. In its abstract application we speak of the law of England, the law of libel, criminal law, and so forth. Similarly, we use the phrases law and order, law and justice, courts of law. In its concrete application, on the other hand, we say that Parliament has enacted or repealed a law; we speak of the by-laws of a railway company or municipality; we hear of the corn laws or the navigation laws. In the abstract sense we speak of law, or of the law; in the concrete sense we speak of a law, or of laws. The distinction demands attention for this reason, that the concrete term is not co-extensive and coincident with the abstract in its application. Law or the law does not consist of the total number of laws in force. The constituent elements of which the law is made up are not laws, but rules of law or legal principles. That a will requires two witnesses is not rightly spoken of as a law of England; it is a rule of English law. A law means a statute, enactment, ordinance, decree or other exercise of legislative

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(*b*) See Aquinas, Summa, 2. 2. q. 57 (De Jure). Art. 2: Utrum jus convenienter dividatur in jus naturale et jus positivum. See also Suarez, De Legibus, I. 3. 13.; (Lex) positiva dicta est, quasi addita naturali legi.

(*c*) See, for example, Blackstone I. 63; *The Zamora*, [1916] 2 A. C. p. 91, *per* Lord Parker.

authority. It is one of the sources of law in the abstract sense. A law produces statute law or some other form of enacted law, just as a judicial precedent produces case law. There is much law recognised, applied and enforced in the courts of justice which has not been enacted by any law. Conversely, although laws commonly produce law, this is not invariably the case. Every Act of Parliament is called a law, but not all Acts of Parliament have as their purpose or effect the formulation of rules of law. Statutes are essentially the formulation of the will of the sovereign legislature, and this may be directed to other purposes than the alteration of the legal system. Before the establishment of the system of judicial divorce, a divorce could only be obtained by means of a private Act of Parliament. But such a statute or law (*sensu concreto*) was no more a source of law (*sensu abstracto*) than is a judicial decree of divorce at the present day. Similarly, an Act of attainder, whereby an offender was declared a traitor and condemned to death, did not create law any more than does the sentence of a criminal court. It must be borne in mind, therefore, that law and laws—the law and a law—are not identical in nature or scope. All law is not produced by laws, and all laws do not produce law.

This ambiguity is a peculiarity of English speech. All the chief Continental languages possess distinct words for the two meanings thus inherent in the English term law. Law in the concrete is *lex*, *loi*, *Gesetz*, *legge*. Law in the abstract is *jus*, *droit*, *Recht*, *diritto*. The law of Rome was not *lex civilis*, but *jus civile*. *Lex*, a statute, was one of the sources of *jus*. So in French with *droit* and *loi*, and in German with *Recht* and *Gesetz*. It is not the case, indeed, that the distinction between these two sets of terms is always rigidly maintained, for we occasionally find the concrete word used in the abstract sense. Medieval Latin, for example, frequently uses *lex* as equivalent to *jus*; we read of *lex naturalis* no less than of *jus naturale*; and the same usage is not uncommon in the case of the French *loi*. The fact remains that the Continental languages possess, and in general make use of, a method of avoiding the ambiguity inherent in the single English term.

It is to be observed, however, that this advantage has been obtained by these languages at a considerable cost, for the terms *jus*, *droit*, *Recht*, *diritto*, are themselves ambiguous in another manner. They mean not only law (*sensu abstracto*), but also right or justice (*d*). In Continental speech and thought, therefore, it is always necessary to bear in mind the distinction between *jus*, *droit*, or *Recht* in their ethical and in their legal signification. A similar double meaning was in earlier usage possessed by the English term right. Common law and common right, for example, were synonymous. The same ambiguity is still possessed by the term equity, which means either natural justice, or that form of law which was developed and administered by the Court of Chancery.

Most English writers have, in defining law, defined it in the concrete instead of in the abstract sense. They have attempted to answer the question: What is a law? while the true enquiry is: What is law? The central idea of juridical theory is not *lex*, but *jus*, not *Gesetz*, but *Recht*. To this inverted and unnatural method of enquiry there are two objections. In the first place, it involves a useless and embarrassing conflict with legal usage. In the mouths of lawyers the concrete signification is quite unusual. They speak habitually of law, of the law, of rules of law, of questions of law, of legal principles, but rarely of a law or of the laws. When they have occasion to express the concrete idea, they avoid the generic expression, and speak of some particular species of laws—a statute, an Act of Parliament, a by-law, or a rule of court. In the second place, this consideration of laws instead of law, of *leges* instead of *jus*, tends almost necessarily to the conclusion that statute law is the type of all law, and the form to which all of it is reducible in the last analysis. It misleads inquirers by sending them to the legis-

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(*d*) D. 1. 1. 11. : Id quod semper aequum ac bonum est jus dicitur. D 1. 1. 10. 2 : Juris prudentia est . . . justi atque injusti scientia. D. 1. 1. 1. 1. : Jus est ars boni et aequi. Grotius, De Jure Belli ac Pacis, 1. 1. 3 : Jus hic nihil aliud quam quod justum est significat.

lature to discover the true nature and origin of law, instead of to the courts of justice. It is consequently responsible for much that is inadequate and untrue in the juridical theory of English writers (*e*).

§ 15. The Definition of Law.

All law is not made by the legislature. In England most of it is made by the law courts. There is more law to be found in the law reports than in the Statute book. But all law, however made, is recognised and administered by the courts, and no rules are recognised and administered by the courts which are not rules of law. It is therefore to the courts and not to the legislature that we must go in order to ascertain the true nature of the law.

The law may be defined as the body of principles recognised and applied by the state in the administration of justice. In other words, the law consists of the rules recognised and acted on by courts of justice.

To this definition the following objection may be made. It may be said: "In thus defining law by reference to the administration of justice, you have reversed the proper order of ideas, for law is first in logical order and the administration of justice second. The latter, therefore, must be defined by reference to the former, and not *vice versa*. Courts of justice are essentially courts of law, justice in this usage of speech being merely another name for law. The administration of justice means the enforcement of the law. The laws are the commands laid by the state upon its subjects, and the law courts are the organs through which these commands are enforced. Legislation, direct or indirect, must precede adjudication. Your definition of law is therefore inadequate, for it runs in a circle. It is not permissible to say that the law is the body of rules observed in the administration of justice, since this function of the state must itself be defined as the application and enforcement of the law."

(*e*) The plural term laws is sometimes used in a collective sense to mean the entire *corpus juris*—the law in its entirety; as in the case of the encyclopædia known as Halsbury's Laws of England. We do not speak, however, of the laws of contract or of torts.

This objection is based on an erroneous conception of the essential nature of the administration of justice. The primary purpose of this function of the state is that which its name implies—to maintain right, to uphold justice, to protect rights, to redress wrongs. The administration of justice may be defined as the maintenance of right or justice within a political community by means of the physical force of the state, and through the instrumentality of the state's judicial tribunals. Law is secondary and unessential. It consists of the authoritative rules which judges apply in the administration of justice, to the exclusion of their own free will and discretion. For good and sufficient reasons the courts which administer justice are constrained to walk in predetermined paths. They are not at liberty to do that which seems right and just in their own eyes. They are bound hand and foot in the bonds of an authoritative creed which they must accept and act on without demur. This creed of the courts of justice constitutes the law; and so far as it extends, it excludes all right of private judgment. The law is the wisdom and justice of the organised commonwealth, formulated for the authoritative direction of those to whom the commonwealth has delegated its judicial functions. What a litigant obtains in the tribunals of a modern and civilised state is doubtless justice according to law, but it is essentially and primarily justice and not law. Judges are appointed, in the words of the judicial oath, "to do right to all manner of people, after the laws and usages of this realm." Justice is the end, law is merely the instrument and the means, and the instrument must be defined by reference to its end.

It is essential to a clear understanding of this matter to remember that the administration of justice is perfectly possible without law at all. Howsoever expedient it may be, howsoever usual it may be, it is not necessary that the courts of the state should, in maintaining right and redressing wrong, act according to those fixed and predetermined principles which are called the law. A tribunal in which right is done to all manner of people in such fashion as commends itself to the unfettered discretion of the judge, in which equity and good conscience and natural justice are excluded by no rigid and artificial rules, in which the judge does that which he deems just in the particular case, regardless of general principles, may not be an efficient or trustworthy tribunal, but is a perfectly possible one. It is a court of justice which is not also a court of law.

Moreover, even when a system of law exists, the extent of it may vary indefinitely. The degree in which the free discretion of a judge in doing right is excluded by predetermined rules of law is capable of indefinite increase or diminution. The total exclusion of judicial discretion by legal principle is impossible in any system. However great is the encroachment of the law, there must remain some residuum of justice which is not according to law—some activities in respect of which the administration of justice cannot be defined or regarded as the enforcement of the law. Law is a gradual growth from small beginnings. The development of a legal system consists in the progressive substitution of rigid pre-established principles for individual judgment, and to a very large extent these principles grow up spontaneously within the tribunals themselves. That great aggregate of rules which constitutes a developed legal system is not a condition precedent of the administration of justice, but a product of it. Gradually, from various sources—precedent, custom, statute—there is collected a body of fixed principles which the courts apply to the exclusion of their private judgment. The question at issue in the administration of justice more and more ceases to be: "What is the right and justice of this case?" and more and more assumes the alternative form: "What is the general principle already established and accepted, as applicable to such a case as this?" Justice becomes increasingly justice according to law, and courts of justice become increasingly courts of law.

§ 16. Justice According to Law.

That it is on the whole expedient that courts of justice should thus become courts of law, no one can seriously doubt. Yet the elements of evil involved in the transformation are too obvious and serious ever to have escaped recognition. Laws are in theory, as Hooker says, "the voices of right reason"; they are in theory the utterances of Justice speaking to men by the mouth of the state; but too often in reality they fall far short of this ideal. Too often they "turn judgment to wormwood," and make the administration of justice a reproach. Nor is this true merely of the earlier and ruder stages of legal development. At the present day our law has learnt, in a measure never before attained, to speak the language of sound reason and good sense, but it still retains in no slight degree the vices of its youth; nor is it to be expected that at any time we shall altogether escape from the perennial conflict between law and justice. It is needful, therefore, that the law should plead and prove the ground and justification of its existence.

The chief uses of the law are three in number. The first of these is that it imparts uniformity and certainty to the administration of justice. It is vitally important not only that judicial decisions should be correct, distinguishing accurately between right and wrong, and appointing fitting remedies for injustice, but also that the subjects of the state should be able to know beforehand the decision to which, on any matter, the courts of justice will come. This provision is impossible unless the course of justice is uniform, and the only effectual method of procuring uniformity is the observance of those fixed principles which constitute the law. It would be well, were it possible, for the tribunals of the state to recognise and enforce the rules of absolute justice, but it is better to have defective rules than to have none at all. For we expect from the coercive action of the state, not merely the maintenance of abstract justice, but the establishment within the body politic of some measure of system, order and harmony in the actions and relations of its members. It is often more important that a rule should be definite, certain, known, and permanent, than that it should be ideally just. Sometimes, indeed, the element of order and certainty is the only one which requires consideration, it being entirely indifferent what the rule is, so long as it exists and is adhered to. The rule of the road is the best and most familiar example of this, but there are many other instances in which justice seems dumb, and yet it is needful that a definite rule of some sort should be adopted and maintained.

For this reason we require in great part to exclude judicial discretion by a body of inflexible law. For this reason it is that in no civilised community do the judges and magistrates, to whom is entrusted the duty of maintaining justice, exercise with a free hand the *viri boni arbitrium*. The more complex our civilisation becomes, the more needful is its regulation by law, and the less practicable the alternative method of judicial procedure. In simple and primitive communities it is doubtless possible, and may even be expedient, that rulers and magistrates should execute judgment in such manner as best commends itself to them. But in the civilisation to which we have now attained, any such attempt to substitute the deliverances of natural reason for predetermined principles of law would lead to chaos. "Reason," says Jeremy Taylor (*f*), "is such a box of quicksilver that it abides no where; it dwells in no settled mansion; it is like a dove's neck; . . . and if we inquire after the law of nature" (that is to say, the principles of justice) "by the rules of our reason, we shall be as uncertain as the discourses of the people or the dreams of disturbed fancies."

It is to be observed, in the second place, that the necessity of conforming to publicly declared principles protects the administration of justice from the disturbing influence of improper motives on the part of those entrusted with judicial functions. The law is necessarily impartial. It is made for no particular person, and for no individual case, and so admits of no respect of persons, and is deflected from the straight course by no irrelevant considerations peculiar to the special instance. Given a definite rule of law, a departure from it by a hairsbreadth is visible to all men, but within the sphere of individual judgment the differences of honest opinion are so manifold and serious that dishonest opinion can pass in great part unchallenged and undetected. Where the duty of

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(*f*) Ductor Dubitantium (Works XII. 209, Heber's ed.).

the judicature is to execute justice in accordance with fixed and known principles, the whole force of the public conscience can be brought to the enforcement of that duty and the maintenance of those principles. But when courts of justice are left to do that which is right in their own eyes, this control becomes to a great extent impossible, public opinion being left without that definite guidance which is essential to its force and influence. So much is this so, that the administration of justice according to law is rightly regarded as one of the first principles of political liberty. "The legislative or supreme authority," says Locke (*g*), "cannot assume to itself a power to rule by extemporary, arbitrary decrees, but is bound to dispense justice, and to decide the rights of the subject by promulgated, standing laws, and known, authorised judges." So, in the words of Cicero (*h*): "We are the slaves of the law that we may be free."

It is to its impartiality, far more than to its wisdom (for this latter virtue it too often lacks), that are due the influence and reputation which the law has possessed at all times. Wise or foolish, it is the same for all, and to it, therefore, men have ever been willing to submit their quarrels, knowing, as Hooker says (*i*), that "the law doth speak with all indifferency; that the law hath no side-respect to their persons." Hence the authority of a judgment according to law. The reference of international disputes to arbitration, and the loyal submission of nations to awards so made, are possible only in proportion to the development and recognition of a definite body of international law. The authority of the *arbitrators* is naught; that of the *law* is already sufficient to maintain in great part the peace of the world. So in the case of the civil law, only so far as justice is transformed into law, and the love of justice into the spirit of law-abidingness, will the influence of the judicature rise to an efficient level, and the purposes of civil government be adequately fulfilled.

Finally, the law serves to protect the administration of justice from the errors of individual judgment. The establish-

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(*g*) Treatise of Government, II. 11. 136.
(*h*) Pro Cluentio, 53. 146.
(*i*) Ecclesiastical Polity, I. 10. 7.

ment of the law is the substitution of the opinion and conscience of the community at large for those of the individuals to whom judicial functions are entrusted. The principles of justice are not always clearly legible by the light of nature. The problems offered for judicial solution are often dark and difficult, and there is great need of guidance from that experience and wisdom of the world at large of which the law is the record. The law is not always wise, but on the whole, and in the long run, it is wiser than those who administer it. It expresses the will and reason of the body politic, and claims by that title to overrule the will and reason of judges and magistrates, no less than those of private men. "To seek to be wiser than the laws," says Aristotle (*k*), "is the very thing which is by good laws forbidden."

These, then, are the chief advantages to be derived from the exclusion of individual judgment by fixed principles of law. Nevertheless, these benefits are not obtained save at a heavy cost. The law is without doubt a remedy for greater evils, yet it brings with it evils of its own. Some of them are inherent in its very nature, others are the outcome of tendencies which, however natural, are not beyond the reach of effective control.

The first defect of a legal system is its rigidity. A general principle of law is the product of a process of abstraction. It results from the elimination and disregard of the less material circumstances in the particular cases falling within its scope, and the concentration of attention upon the more essential elements which these cases have in common. We cannot be sure that, in applying a rule so obtained, the elements so disregarded may not be material in the particular instance; and if they are so, and we make no allowance for them, the result is error and injustice. This possibility is fully recognised in departments of practice other than the law. The principles of political economy are obtained by the elimination of every motive save the desire for wealth, but we do not apply them blindfold to individual cases without first

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(*k*) Rhetoric, I. 15. See also Bacon, De Augmentis, Lib. 8, Aph. 58; Neminem oportere legibus esse sapientiorem.

taking account of the possibly disturbing influence of the eliminated elements. In law it is otherwise, for here a principle is not a mere guide to the due exercise of a rational discretion, but a substitute for it. It is to be applied without any allowance for special circumstances, and without turning to the right hand or to the left. The result of this inflexibility is that, however carefully and cunningly a legal rule may be framed, there will in all probability be some special instances in which it will work hardship and injustice, and prove a source of error instead of a guide to truth. So infinitely various are the affairs of men, that it is impossible to lay down general principles which will be true and just in every case. If we are to have general rules at all, we must be content to pay this price.

The time-honoured maxim, *Summum jus est summa injuria*, is an expression of the fact that few legal principles are so founded in truth that they can be pushed to their extremest logical conclusions without leading to injustice. The more general the principle, the greater is that elimination of immaterial elements of which it is the result, and the greater therefore is the chance that, in its rigid application, it may be found false. On the other hand, the more carefully the rule is qualified and limited, and the greater the number of exceptions and distinctions to which it is subject, the greater is the difficulty and uncertainty of its application. In attempting to escape from the evils which flow from the rigidity of the law, we incur those due to its complexity, and we do wisely if we discover the golden mean between the two extremes.

Analogous to the vice of rigidity is that of conservatism. The former is the failure of the law to conform itself to the requirements of special instances and unforeseen classes of cases. The latter is its failure to conform itself to those changes in circumstances and in men's views of truth and justice which are inevitably brought about by the lapse of time. In the absence of law, the administration of justice would automatically adapt itself to the circumstances and opinions of the time, but fettered by rules of law, courts of justice do the bidding, not of the present, but of the times past in which those rules were fashioned. That which is true to-day may become false to-morrow by change of circumstances, and that which is taken to-day for wisdom may to-morrow be recognised as folly by the advance of knowledge. This being so, some method is requisite whereby the law, which is by nature stationary, may be kept in harmony with the circumstances and opinions of the time. If the law is to be a living organism, and not a mere petrification, it is necessary to adopt and to use with vigilance some effective instrument of legal development, and the quality of any legal system will depend on the efficiency of the means so taken to secure it against a fatal conservatism. Legislation—the substitution of new principles for old by the express declaration of the state—is the instrument approved by all civilised and progressive races, none other having been found comparable to this in point of efficiency. Even this, however, is incapable of completely counteracting the evil of legal conservatism. However perfect we may make our legislative machinery, the law will lag behind public opinion, and public opinion behind the truth.

Another vice of the law is formalism. By this is meant the tendency to attribute undue importance to form as opposed to substance, and to exalt the immaterial to the level of the material. It is incumbent on a perfect legal system to exercise a sound judgment as to the relative importance of the matters which come within its cognisance; and a system is infected with formalism in so far as it fails to meet this requirement and raises to the rank of the material and essential that which is in truth unessential and accidental. Whenever the importance of a thing in law is greater than its importance in fact, we have a legal formality. The formalism of ancient law is too notorious to require illustration, but we are scarcely yet in a position to boast ourselves as above reproach in this matter. Much legal reform is requisite if the maxim *De minimis non curat lex* is to be accounted anything but irony.

The last defect that we shall consider is undue and needless complexity. It is not possible, indeed, for any fully developed body of law to be such that he who runs may read it. Being, as it is, the reflection within courts of justice of the complex facts of civilised existence, a very considerable degree of elaboration is inevitable. Nevertheless the gigantic bulk and bewildering difficulties of our own labyrinthine system are far beyond anything that is called for by the necessities of the case. Partly through the methods of its historical development, and partly through the influence of that love of subtilty which has always been the besetting sin of the legal mind, our law is filled with needless distinctions, which add enormously to its bulk and nothing to its value, while they render a great part of it unintelligible to any but the expert. This tendency to excessive subtilty and elaboration is one that specially affects a system which, like our own, has been largely developed by way of judicial decisions. It is not, however, an unavoidable defect, and the codes which have in modern times been enacted in European countries prove the possibility of reducing the law to a system of moderate size and intelligible simplicity.

From the foregoing considerations as to the advantages and disadvantages which are inherent in the administration of justice according to law, it becomes clear that we must guard against the excessive development of the legal system. If the benefits of law are great, the evils of too much law are not small. Bacon has said, after Aristotle (*l*): *Optima est lex quae minimum relinquit arbitrio judicis.* However true this may be in general, there are many departments of judicial practice to which no such principle is applicable. Much has been done in recent times to prune the law of morbid growths. In many departments judicial discretion has been freed from the bonds of legal principle. Forms of action have been abolished; rules of pleading have been relaxed; the credibility of witnesses has become a matter of fact, instead of as formerly one of law; a discretionary power of punishment has been substituted for the terrible legal uniformity which once disgraced the administration of criminal justice; and the future will see further reforms in the same direction.

(*l*) Bacon, De Augmentis, Lib. 8, Aph. 46; Aristotle's Rhetoric, I. 1.

We have hitherto taken it for granted that legal principles are necessarily inflexible—that they are essentially peremptory rules excluding judicial discretion so far as they extend—that they must of necessity be followed blindly by courts of justice even against their better judgment. There seems no reason, however, in the nature of things why the law should not, to a considerable extent, be flexible instead of rigid—should not aid, guide, and inform judicial discretion, instead of excluding it—should not be subject to such exceptions and qualifications as in special circumstances the courts of justice shall deem reasonable or requisite. There is no apparent reason why the law should say to the judicature: "Do this in all cases, whether you consider it reasonable or not," instead of "Do this except in those cases in which you consider that there are special reasons for doing otherwise." Such flexible principles are not unknown even at the present day, and it seems probable that in the more perfect system of the future much law that is now rigid and peremptory will lapse into the category of the conditional. It will always, indeed, be found needful to maintain great part of it on the higher level, but we have not yet realised to what an extent flexible principles are sufficient to attain all the good purposes of the law, while avoiding much of its attendant evil. It is probable, for instance, that the great bulk of the law of evidence should be of this nature. These rules should for the most part guide judicial discretion, instead of excluding it. In the former capacity, being in general founded on experience and good sense, they would be valuable aids to the discovery of truth; in the latter, they are too often the instruments of error.

§ 17. The Imperative Theory of Law.

We have defined the law as consisting of the rules in accordance with which justice is administered by the judicial tribunals of the state. In a previous chapter we adverted to and partially considered a different doctrine which has received widespread acceptance, and which may be termed the imperative or purely imperative theory of law. According to this theory the civil law is essentially and throughout its whole compass nothing more than a particular variety of imperative law, and consists of the general commands issued by the state to its subjects and enforced through the agency of courts of law by the sanction of physical force. It is now necessary to consider this theory more fully.

We have already seen that it contains an important element of truth. It rightly recognises the essential fact that civil law is the product of the state and depends for its existence on the physical force of the state exercised through the agency of judicial tribunals. Where there is no state which governs a community by the use of physical force, there can be no such thing as civil law. It is only if and so far as any rules are recognised by the state in the exercise of this function that these rules possess the essential nature of civil law.

This being so, there is no weight to be attributed to what may be termed the historical argument against the imperative theory of law. This argument may be formulated as follows: "Although the definition of law as the command of the state is plausible, and is at first sight sufficient, as applied to the developed political societies of modern times, it is inapplicable to more primitive communities. Early law is not the command of the state; it has its source in custom, religion, or public opinion, and not in any authority vested in a political superior. It is not until a comparatively late stage of social evolution that law assumes its modern form and is recognised as a product of supreme power governing a body politic. Law is prior to, and independent of, political authority and enforcement. It is enforced by the state because it is already law, and not *vice versa* (*m*)."

(*m*) See, for example, Bryce's Studies in History and Jurisprudence, Vol. II., pp. 44 and 249: "Broadly speaking, there are in every community two authorities which can make law: the State, *i.e.*, the ruling and directing power, whatever it may be, in which the government of the community resides, and the People, that is, the whole body of the community, regarded not as incorporated in the state, but as being merely so many persons who have commercial and social relations with one another. . Law cannot be always and everywhere the creation of the state, because instances can be adduced where law existed in a community before there was any state." See also Pollock's First Book of Jurisprudence, p. 24, 2nd ed.: "That imperative character of law, which in our modern experience is its constant attribute, is found to be wanting in societies which it would be rash to call barbarous, and false to call lawless. . . Not only law, but

To this argument the advocates of the imperative theory can give a valid reply. If there are any rules prior to, and independent of the state, they may greatly resemble law; they may be the primeval substitutes for law; they may be the historical source from which law is developed and proceeds; but they are not themselves law. There may have been a time in the far past when a man was not distinguishable from the anthropoid ape, but that is no reason for now defining a man in such manner as to include an ape. To trace two different things to a common origin in the beginnings of their historical evolution is not to disprove the existence or the importance of an essential difference between them as they now stand. This is to confuse all boundary lines, to substitute the history of the past for the logic of the present, and to render all distinction and definition vain. The historical point of view is valuable as a supplement to the logical and analytical, but not as a substitute for it. It must be borne in mind that in the beginning the whole earth was without form and void, and that science is concerned not with chaos but with cosmos.

The plausibility of the historical argument proceeds from the failure adequately to comprehend the distinction, hereafter to be noticed by us, between the formal and the material sources of law. Its formal source is that from which it obtains the nature and force of law. This is essentially and exclusively the power and will of the state. Its material sources, on the other hand, are those from which it derives its material contents. Custom and religion may be the material sources of a legal system no less than that express declaration of new legal principles by the state which we term legislation. In early times, indeed, legislation may be unknown. No rule of law may as yet have been formulated in any declaration of the state. It may not yet have occurred to any man that such a process as legislation is possible, and no ruler may ever yet have made a law. Custom and religion may be all-powerful

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law with a good deal of formality, has existed before the State had any adequate means of compelling its observance, and indeed before there was any regular process of enforcement at all." See also Maine's Early History of Institutions, Lect. 12, p. 364, and Lect. 13, p. 380.

and exclusive. Nevertheless if any rule of conduct has already put on the true nature, form, and essence of the civil law, it is because it has already at its back the power of the organised commonwealth for the maintenance and enforcement of it.

Yet, although the imperative theory contains this element of the truth, it is not the whole truth. It is one-sided and inadequate—the product of an incomplete analysis of juridical conceptions. In the first place it is defective inasmuch as it disregards that *ethical* element which is an essential constituent of the complete conception. As to any special relation between law and justice, this theory is silent and ignorant. It eliminates from the implication of the term law all elements save that of force. This is an illegitimate simplification, for the complete idea contains at least one other element which is equally essential and permanent. This is, right or justice. If rules of law are from one point of view commands issued by the state to its subjects, from another standpoint they appear as the principles of right and wrong so far as recognised and enforced by the state in the exercise of its essential function of administering justice. Law is not right alone, or might alone, but the perfect union of the two. It is justice speaking to men by the voice of the state. The established law, indeed, may be far from corresponding accurately with the true rule or right; nor is its legal validity in any way affected by any such imperfection. Nevertheless in *idea* law and justice are coincident. It is for the expression and realisation of justice that the law has been created, and, like every other work of men's hands, it must be defined by reference to its end and purpose. A purely imperative theory, therefore, is as one-sided as a purely ethical or non-imperative theory would be. It mistakes a part of the connotation of the term defined for the whole of it.

We should be sufficiently reminded of this ethical element by the usages of popular speech. The terms law and justice are familiar associates. Courts of law are also courts of justice, and the administration of justice is also the enforcement of law. Right, wrong, and duty are leading terms of law, as well as of morals. If we turn from our own to foreign languages, we find that law and right are usually called by the very same name. *Jus*, *droit*, *Recht*, *diritto*, have all a double meaning; they are all ethical, as well as juridical; they all include the rules of justice, as well as those of law. Are these facts, then, of no significance? Are we to look on them as nothing more than accidental and meaningless coincidences of speech? It is this that the advocates of the theory in question would have us believe. We may, on the contrary, assume with confidence that these relations between the names of things are but the outward manifestation of very real and intimate relations between the things named. A theory which regards the law as the command of the state and nothing more, and which entirely ignores the aspect of law as a public declaration of the principles of justice, would lose all its plausibility if expressed in a language in which the term for law signifies justice also.

Even if we incorporate the missing ethical element in the definition, even if we define the law as the sum of the principles of justice recognised and enforced by the state, even if we say with Blackstone (*n*) that law is "a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong," we shall not reach the whole truth. For although the idea of command or enforcement is an essential implication of the law, in the sense that there can be no law where there is no coercive administration of justice by the state, it is not true that every legal principle assumes, or can be made to assume, the form of a command. Although the imperative rules of right and wrong, as recognised by the state, constitute a part, and, indeed, the most important part, of the law, they do not constitute the whole of it. The law includes the whole of the principles accepted and applied in the administration of justice, whether they are imperative principles or not. The only legal rules which conform to the imperative definition are those which create legal obligations, and no legal system consists exclusively of rules of this description. All well-developed bodies of law contain innumerable principles which have some other purpose and content than this, and so fall

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(*n*) Commentaries, I. 44.

outside the scope of the imperative definition. These non-imperative legal principles are of various kinds. There are, for example, permissive rules of law—namely, those which declare certain acts not to be obligatory or not to be wrongful—a rule, for instance, declaring that witchcraft or heresy is no crime, or that damage done by competition in trade is no cause of action. It cannot be denied that these are rules of law as that term is ordinarily used, and it is plain that they fall within the definition of the law as the principles acted on by courts of justice. But in what sense are they enforced by the state? They are not commands, but permissions; they create liberties, not obligations. So, also, the innumerable rules of judicial procedure are largely non-imperative. They are in no proper sense rules of conduct enforced by the state. Let us take, for example, the principles that hearsay is no evidence; that written evidence is superior to verbal; that a contract for the sale of land cannot be proved except by writing; that judicial notice will be taken of such and such facts; that matters once decided are decided once for all as between the same parties; that the interpretation of written documents is the office of the judge and not of the jury; that witnesses must be examined on oath or affirmation; that the verdict of a jury must be unanimous. Is it not plain that these are in their true nature rules in accordance with which judges administer justice to the exclusion of their personal judgment, and not rules of action appointed by the state for observance by its subjects and enforced by legal sanctions?

There are various other forms of non-imperative law, notably those which relate to the existence, application, and interpretation of other rules. The illustrations already given, however, should be sufficient to render evident the fact that the purely imperative theory not merely neglects an essential element in the idea of law, but also falls far short of the full application or denotation of the term. All legal principles are not commands of the state; and those which are such commands are at the same time, and in their essential nature, something more, of which the imperative theory takes no account.

§ 18. The Authority of Law.

Some writers have endeavoured to avoid the foregoing objections to the purely imperative theory of law by regarding rules of procedure, and all other non-imperative principles, as being in reality the commands of the state addressed, not to the public at large, but to the judges. The rule, they say, that murder is a crime is a command addressed to all persons not to commit murder, and the rule that the punishment for murder is death is a command to the judges to inflict that punishment. Similarly, the rule that hearsay is not admissible in evidence is a command of the state to the judges not to admit evidence of that kind. By taking this view of the matter, it is endeavoured to bring the whole body of legal principles within the scope of the definition of law as the general commands of the state (*o*).

This contention brings us to the consideration of the true nature of the obligation of courts of justice to recognise and apply those fixed principles which constitute the law. Hitherto we have spoken of the law as being authoritative within the courts of justice; we have spoken of those courts as being under an obligation to observe the law in the exercise of their function of administering justice, instead of acting in accordance with their own views of right and wrong. It is now necessary to consider the nature of this authority and of this obligation. In what sense and by what means is a judge bound, for example, in deciding a case to follow the precedents set in former cases, instead of following the dictates of his own reason?

It is clear, in the first place, that judges are under a moral obligation to observe the law. This is the business for which they were appointed. This is the duty which they undertook by their judicial oaths, when they swore to administer justice according to law. The observance of this moral obligation is secured and enforced by the pressure of public opinion, and more especially of that professional opinion of the bar which

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(*o*) See for example Bentham's Principles of Morals and Legislation, p. 330, Works, I. 151; Ihering, Zweck im Recht, I. p. 334 (3rd ed.).

would be quick to notice and to censure any departure by the bench from the established principles of law. Moreover, the wilful refusal of a judge to apply the established law would amount to misconduct in his office, for which he could rightly be removed by the proper executive authority.

To this moral obligation, is there superadded any legal obligation? Is the duty of a court to administer justice according to law a legal obligation enforceable as such by any form of judicial proceeding, and, if so, in what cases and in what manner? In the case of inferior courts which are subject to a superior court by way of appellate or superintending jurisdiction, the duty of the inferior court to observe the law is enforced as a legal obligation by the superior court. If the lower court goes wrong in law, its judgment will be reversed and a correct judgment in accordance with law will be substituted. If the lower court refuses to exercise its lawful jurisdiction, or claims to exercise a jurisdiction beyond that which the law confers on it, the superintending jurisdiction of a higher court may be used to compel observance of the law. Legal control of an inferior court may go even further, for a system is readily conceivable in which a judicial officer who disregards the law may, in a higher court, be subject to criminal proceedings, or to actions for damages at the suit of persons so injured by him. So far as inferior courts of justice are concerned, therefore, there is no difficulty in recognising, not merely a moral, but also a legal obligation to administer justice according to law. But in the case of a superior court of judicature (meaning thereby a court which is not subject to the appellate or superintending authority of any other court), such a legal obligation is impossible. There is no other court in which any such obligation could be recognised or enforced. Moreover, the system of a hierarchy of courts, some of which possess jurisdiction over others, is not an essential part of the constitution of a state. A system is possible in which the public justice of a state is administered by a single court, or by a series of co-ordinate courts, without the existence of any appellate or other controlling jurisdiction.

In such cases there can be no legal obligation imposed on the courts to observe the law. A legal obligation is imposed by a rule of law, and there can be no rule of law unless there is a court having jurisdiction to declare, apply, and enforce it. To suppose, therefore, that every court is bound by a rule of law, and by a resulting legal obligation to observe the system of law in force in that court, is clearly a fallacy. Observance of the law may be enforced on an inferior court by a superior, and upon that superior court by another superior to it, but the process must stop somewhere. The world, as has been determined by Eastern philosophy, may stand on an elephant, and the elephant on a tortoise, but the tortoise must be self-supporting. The High Court may enforce the law upon the County Courts; the Court of Appeal may enforce it upon the High Court; and the House of Lords upon the Court of Appeal. But this process cannot be endless. The duty of the final tribunal to administer justice according to law must be recognised as a moral obligation merely. If the House of Lords were wilfully to misconstrue an Act of Parliament, the interpretation so placed on that Act would *ipso facto* be the law of England, for there is no other judicial tribunal with jurisdiction and authority to decide the contrary.

Since, therefore, the courts of justice cannot be universally under a legal obligation to observe and apply the law, no such legal obligation can be regarded as forming a part of the definition of law. Such a definition would amount to reasoning in a circle. Law is law, not because the courts are under any legal obligation to observe it, but because they do in fact observe it. No rule that is not thus in fact observed in accordance with the established practice of the courts is a rule of law, and, conversely, every rule that is thus in fact observed amounts to a rule of law. It is to the courts of justice, and to them alone, that we must have recourse if we wish to find out what rules are rules of law and what are not. In the last resort the authority of the law over the courts themselves has its source merely in the moral obligation of the judges to observe their judicial oaths, and fulfil their appointed functions, by administering justice according to law.

§ 19. Justice.

We have defined the civil law by reference to the idea of right or justice. We have said that the law consists of the rules recognised and applied by the courts in the exercise of their function of enforcing and maintaining right or justice by means of the physical force of the state. If this is so, right or justice comes first in the order of logical conceptions, and law comes second and is derivative. A complete analysis of the idea of law involves, therefore, an analysis of the ethical element so involved in it. This task pertains in its full compass to the science of ethics rather than to that of jurisprudence, but a partial examination of the question is necessary here in view of the intimate relation which exists between the theory of law and the theory of justice.

We have used the terms right and justice as being synonymous. The question whether this is correct, or whether, on the contrary, justice is only one form or species of right, and, if so, what is the nature of the specific difference between justice and other forms of right, must be reserved for later consideration. In the meantime the possibility of any such difference will be ignored, and we shall regard the sphere of justice and the sphere of right as coincident and co-extensive.

Natural and legal justice. Justice is of two kinds, being either (1) natural or moral justice, or (2) legal justice. The first of these is justice in itself—in deed and in truth; the second is justice as actually declared and recognised by the civil law and enforced in the courts of law. Natural justice is the ideal and the truth, of which legal justice is the more or less imperfect realisation and expression. Legal justice is the authoritative formulation of natural justice by the civil law for the direction of the courts by which justice is administered. Such portions of natural justice as are deemed fit for maintenance and enforcement by the state are formulated by the law in rules which must be accepted by the courts as the authoritative expression of such justice. Natural justice, as so authoritatively formulated, constitutes the legal justice of the state. Natural justice bears to legal justice the same relation that the truth bears to an authoritative creed which precludes inquiry.

Natural and legal duties. Involved in the conception of justice are the derivative conceptions of duties and rights, and just as there are two kinds of justice so there are two kinds of duties and of rights. A duty is an act required by a rule of justice—an act the contrary of which would be an act of injustice or wrong. Duties, accordingly, are either (1) natural or moral duties or (2) legal duties. A duty of the first kind is one which is required by a rule of natural justice—an act the contrary of which would be an act of moral injustice. A legal duty, on the other hand, is one which is required by a rule of legal justice—an act the contrary of which would amount to a violation of the law and a legal wrong or injury. A moral or natural duty becomes also a legal duty when the rule of natural justice, to which it owes its origin, is recognised also by the law as a rule of legal justice.

Natural and legal rights. So, also, with rights. A right is an interest recognised and protected by a rule of right or justice. All rules of right or justice exist for the protection of the interests of men against the acts of other men. But all the interests of men are not so protected. Those which are so protected are called rights. All right is *the* right of the person for whose sake it exists, and who is interested in the observance of it. That I have a right to anything means that it is right that I should have that thing. This being so, rights must be of two kinds, just as the justice in which they have their source is of two kinds. They are either (1) natural or moral rights, or (2) legal rights. A right of the first kind is one which is conferred by a rule of natural or moral justice. A legal right, on the other hand, is one which is conferred by a rule of legal justice. A natural or moral right becomes also a legal right when the rule of natural justice, in which it has its origin, is recognised also by the law as a rule of legal justice.

Legal justice and natural justice represent intersecting circles. Justice may be legal but not natural, or natural but not legal, or both legal and natural. For the law is necessarily incomplete in the sense that it does not seek to cover the whole sphere of natural or moral justice or duty; and it is also necessarily to some extent imperfect and erroneous, recognising and enforcing as justice what is not justice in deed and in truth, and therefore creating rights and enforcing duties which are legal rights and duties only, and not also natural rights and duties.

What, then, is the true nature of this natural or moral justice which is thus distinguished from legal justice, and what is the true nature of these natural or moral rights and duties? Before attempting an answer to this question there are three possible misconceptions which should be cleared away.

Natural justice and ideal law. In the first place, natural justice does not mean an ideal or perfect form of legal justice. A moral right cannot be defined as one which ought to be recognised as a legal right, nor a moral duty as one which ought to be enforced as a legal duty. For, in the first place, there is a large portion of the sphere of natural or moral right and justice which is not fit for enforcement by the state at all; and, in the second place, even within that portion which is thus fit for enforcement, there is a large part which is not fit for reduction to rigid rules of civil law, but is rightly left to the discretion of the courts to do that which is thought by them to be required by natural justice; and, in the third place, we reason in a circle when we try to define natural right or justice by the use of the term "ought," or by reference to the ideal or the perfect form of civil law. The term "ought" involves in itself the conception of right, and therefore cannot be used for the purpose of defining it. So the ideal or perfect form of law can only be defined as that which most completely maintains right or justice.

Natural justice and positive morality. In the second place, natural or moral justice is not to be identified with the rules of positive morality. Positive morality means the rules of conduct approved by the public opinion of any community—the rules which are maintained and enforced in that community, not by the civil law, but by the sanction of public disapprobation and censure. Positive morality bears the same relation to natural right or justice that legal right or justice does. Positive morality is a more or less incomplete and imperfect attempt by the public opinion of a community to formulate and enforce the rules of natural right and justice, even as legal justice is the attempt of the state, by its legislature and courts of justice, to do the same. The rights and duties prescribed and enforced by the social law of public opinion, no less than those prescribed and enforced by the civil law of the state, may be far from complete coincidence or identity with those recognised by the rule of natural right and justice.

Natural law. In the third place, natural or moral right or justice is not to be conceived as a system of authoritative and binding rules imposed upon mankind by some form of imperative law, just as legal justice consists of rules imposed upon citizens by the imperative law of the state to which they belong. The idea of a law of nature or a moral law—*lex naturae*, *lex naturalis*—as a form of imperative law in which natural justice has its source, just as legal justice has its source in the imperative law of the state, has played a notable part in the history of human thought in the realms of ethics, theology, politics, and jurisprudence. It was long the accepted tradition of those sciences, but it has now fallen on evil days, and it can no longer be accepted as in harmony with modern thought on those matters.

This imperative theory of natural right and justice has, in the course of its history, assumed two forms and passed through two stages, which may be conveniently distinguished as the theological and the secular. In the first of these, natural or moral law is conceived as imposed upon men by the command of God. In a passage which has been already quoted from Thomasius, it is said (*p*): "Natural law is a Divine law, written in the hearts of all men, obliging them to do those things which are necessarily consonant to the rational nature of mankind." So we read in the Catechism

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(*p*) Inst. Jurisp. Div. I. 2. 97.

of the Church of Scotland that (*q*): "The moral law is the declaration of the will of God to mankind directing and binding everyone to obedience thereunto . . . in performance of all those duties of holiness and righteousness which he oweth to God and man; promising life upon the fulfilling and threatening death upon the breach of it." So in later days Blackstone says (*r*): "The law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original."

In its alternative and secular form, natural or moral law is still conceived as in some sort imperative, but the idea of Divine imposition and command has disappeared or receded into the background of thought, and this law is vaguely and metaphorically regarded and spoken of as imposed authoritatively on mankind by Nature or by Reason or by the Conscience. It is no longer the command of God, but the imperative idea is retained, and the moral law, the rule of right and wrong, is conceived as the product of some form of legislative authority possessed by man over himself—as by his reason over his passions, or by his higher nature over his lower. The idea of moral duty or obligation is still vaguely conceived as based on some form of imperative imposition, although no longer explicitly on Divine imposition. But this secular form of natural or moral law is merely the frustrate ghost of the natural or moral law of the theologians. Regarded as a form of imperative law, whether from the religious or from the secular point of view, natural or moral law no longer finds a recognised place in the ethical or juristic speculation of the present day. Indeed, the terms themselves, which have had so long and influential a history in law and morals, have all but fallen out of use. We still speak of natural justice, rights, and duties, but rarely of that natural law by which

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(*q*) Larger Catechism of the Westminster Assembly of Divines, Quest 93 (1648).

(*r*) Commentaries I. 41.

they are recognised. Nevertheless, the term natural law, if definitely freed from its early and misleading associations of command and authoritative imposition, is capable of useful service. So long as we do not suppose that natural law is the *source* of natural justice, in the sense of an imperative law by which it is established and from which it derives authority, we may usefully continue to employ the term as meaning nothing more than the aggregate of the rules of natural justice. The elimination of the illegitimate imperative idea reduces natural law from a system of authoritative imposition to a system of doctrine. A system of natural law declares, formulates, or expresses the principles of natural right and justice, but it does not add compulsion to instruction. Natural justice becomes imperative only when its principles are recognised as fit for compulsory enforcement by some form of human authority—notably by the state through the instrumentality of courts of justice and the civil law. The essential purpose and business of those courts is to give to natural justice that coercive authority which in itself it lacks, and to maintain it by the physical force of the incorporate community against all who disregard it. The legal justice of the state is natural justice armed. Similarly, natural law and justice become, by another road, a system of imperative imposition and control, so far as recognised by, and incorporated in, that law of positive morality which has its source in public opinion and its sanction in the penalties of public censure.

So long as natural or moral law is conceived as being a form of imperative law analogous to civil law, the same imperative element is carried into the derivative conceptions of natural or moral duties and rights. Moral duties, like legal duties, are thought of as imposed and enforced by some form of authoritative constraint. Natural rights, like legal rights, are conceived as claims capable of some form of exaction. The elimination of the imperative element from natural law eliminates it at the same time from the conception of natural or moral rights and duties. The element of coercion is left to be superadded *ab extra* by some form of positive and imperative law, and is no longer conceived as inherent in the natural or moral rights and duties themselves. A natural duty becomes merely an act the omission of which would be inconsistent with the rules of natural justice; and a natural right becomes merely an interest the disregard of which would be a breach of natural justice—an interest, that is to say, which is protected by natural duties imposed on other persons.

The nature of justice. If natural law and justice is not a system of command, authority or government, but is merely a system of doctrine, what is the subject-matter of this doctrine, and what does it teach? The significance of all human action depends, in law and morals, on its effect on human welfare. Acts that have no effect, whether for good or evil, on the interests of mankind have no significance either for ethics or for jurisprudence (*s*). In what then does human welfare—the good of mankind—consist? On this question philosophers have disputed in all ages, and with respect to it there are two predominant types of ethical theory. According to one of these human well-being—the *summum bonum*—consists in human perfection, and according to the other it consists in human happiness. Philosophers who hold the first of these opinions teach us that it is the business of a man to seek perfection—to attain the ideal form and nature of a man—and so to fulfil Nature's purposes in making him. They hold, accordingly, that everything is good which makes for such perfection, and everything evil which hinders it. Philosophers of the other school teach us that the business of men is to be happy; that everything is good so far as it produces happiness, and everything evil so far as it produces suffering and sorrow, and that nothing is either good or evil for any other reason. Rightly understood, however, these two different theories lead us to the same results. Men have no means of knowing the purpose for which Nature created them—if any such purpose there be—except by taking as their guide the instincts with which Nature has endowed them. In

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(*s*) For the sake of simplicity of statement we leave out of account for the present the welfare and interests of the lower animals.

accordance with these instincts they desire certain things and seek them. In the satisfaction of these desires and the successful accomplishment of these endeavours they find life and happiness. In the frustration of these desires and the failure of these endeavours they find pain, sorrow, and death. The only perfection which man is capable of knowing lies in his capacity thus to do Nature's bidding and to attain the reward of his activities and the satisfaction of his desires. The only test of perfection, and the only *indicia* of conformity to the ideal type and final cause of human nature, are to be found in the conditions of human happiness. Let us say, therefore, that human well-being—the *summum bonum*—consists in the abolition, so far as may be, of suffering and sorrow and the increase, so far as may be, of all forms of desirable consciousness, so that men may lead happy lives enduring to length of days.

It is from its effect on human welfare, as so conceived, that all human action derives its practical significance, and by reference to this effect that it must be judged. Now this effect is twofold. An action may be considered either as to its effect on the well-being of the actor himself, or as to its effect on the well-being of mankind at large. Viewed solely in regard to the actor himself, his act is to be judged as being either wise or foolish—wise if it promotes his well-being, foolish if it diminishes it. Viewed, not merely in regard to the actor himself, but in regard to the general well-being, his act is to be judged as right or wrong, just or unjust. It is right and just if it promotes the public welfare; wrong and unjust if it diminishes it. The rule of wisdom—that is to say, self-regarding wisdom, the prudence of self-interest—instructs a man how he must act in order thereby to secure and promote his own welfare. The rule of justice instructs him how he must act in order to secure and promote the general welfare of mankind.

If the interests of each individual were in all respects coincident with the interests of mankind at large; if it were possible for every man to pursue his own desires and purposes and to seek his own good without thereby interfering with the similar activities of other men, there would be no need or place for the rule of justice. The rule of practical wisdom and of self-interest would serve all purposes. But this is not so. The world is so made that the good things in it are like bread in a besieged city. There is not enough and to spare for all. The good which is available must therefore be so apportioned among those who seek it as to be put to the best use. To allow every man to take as much of it as he can get is to waste much of what there is. The rule of this apportionment is the rule of justice. Justice consists in giving to every man his own. The rule of justice determines the sphere of individual liberty in the pursuit of individual welfare, so as to confine that liberty within the limits which are consistent with the general welfare of mankind. Within the sphere of liberty so delimited for every man by the rule of justice, he is left free to seek his own interest in accordance with the rule of wisdom.

So far there is no question of compulsion, command, or authority. Neither the law of self-regarding wisdom nor the law of natural justice belongs to the class of laws imperative. They are practical laws in the sense in which that term has been defined in the preceding chapter of this book. They assume or presuppose a certain end or purpose, and lay down the rules of action by which that end or purpose is to be reached. The formula of every such law is not that of command, but that of advice: to reach that end, this is the way which you must take. The law of justice is in this respect of the same nature as the law of self-interest. If command is to be added to advice, and authority to doctrine, the additional element must be found in some regulative or coercive system of government, such as the administration of justice by the state or the control exercised by the pressure of public opinion in support of those rules which are recognised within any society as being the rules of right.

Both within the sphere of justice and within the sphere of the wisdom of self-interest, the conception involved in the word "ought" is of the same nature. The statement that a man ought to do a certain act presupposes some appointed end, and indicates that the act in question is the proper means to that end. That he ought to take care of his health and to practise temperance means that this is the way to his own welfare. That he ought to keep his promises and abstain from violence and fraud means that this is the way to the general welfare. But the conception of "ought" has no application to the end itself. The question why a man ought in the way of justice to seek the general welfare has no more meaning, and therefore no more admits of an answer, than the question why he ought in the way of wisdom to seek his own.

We have, for the sake of simplicity, spoken of that general welfare, to which the rule of right and justice is directed, as if it was confined to the welfare of mankind. If, however, we accept the utilitarian view that the good means happiness and that evil means pain, it becomes clear that the welfare of the lower animals does not differ save in degree from the welfare of mankind, and must be counted as part of that general welfare which is under the guardianship of the rule of right. We owe moral duties to beasts as well as to men, and in the civil law of modern and civilised communities this part of natural justice has become a part of legal justice also. But the capacities and needs of beasts, in respect of their sentient and emotional life, are so immeasurably below those of men that the interests of beasts, as so recognised by the rules of natural and legal justice, are of little more than negligible importance as compared with the elements of human welfare. Indeed, the civil law, while punishing unjustifiable cruelty to beasts as a criminal offence, does not so far recognise their interests as to treat them as legal rights. All legal rights are the rights of men. It is practically sufficient, therefore, while recognising the subordinate claims of the lower animals, to deal with the theory of right and law as if it related to the general welfare of mankind alone. We may say with the Roman lawyers (*t*): *Hominum causa omne jus constitutum.*

(*t*) D. I. 5. 2. The legal status of the lower animals is further considered in a later chapter of this work. Ch. 15, sect. 109.

Justice conceived as one portion of right. In the general sense in which we have hitherto used the term, justice is synonymous with right. The rule of justice and the rule of right are the same thing and co-extensive in their scope. All right is justice and all wrong is injustice. It is now to be observed that a narrower meaning is often given to the term justice. Justice is conceived as being merely one part of right, and not the whole of it. Similarly, duties are recognised as of two kinds, only one of which consists of duties of justice. So wrong is divided into two kinds, and only one of them amounts to injustice. What then is the nature of the distinction thus indicated? It is based on the distinction between rights and duties. Justice, it is said, means specifically the observance of rights, and injustice the violation of rights. But all duties, it is said, do not correspond to rights vested in other persons. Every breach of duty, therefore, does not amount to injustice; it may be a breach of the rule of right in general, but not a breach of the rule of justice in particular. A man acts unjustly, it is said, if he refuses to pay his debts, or if he breaks his contracts, or if he takes away or injures another man's property, or if he obtains money by fraud, for in all such cases he violates a right vested in someone else. But no one would accuse him of injustice because he is drunk and disorderly, or carries on a noxious trade to the annoyance of the public, or obstructs the public highway; for in such cases, it is said, although he disregards his duty, he does not violate any correspondent right vested in another person. Justice, as the Roman lawyers said, consists in giving to every man his rights: *Justitia est constans et perpetua voluntas jus suum cuique tribuens* (*u*).

The distinction so drawn between right in general and justice in particular does not seem capable, however, of standing the test of logical analysis. The truth of the matter would seem rather to be this, that the distinction is one of aspect and point of view rather than one of nature or subject-matter. All right or wrong conduct has two aspects, and is capable of being looked at from two different points of view.

(*u*) Just. Inst. I. i. pr.

The point of view may be either that of duties or that of rights. We may view and judge an action with reference either to the duty fulfilled or broken by the actor, or, alternatively, with reference to the right which is thereby preserved or violated. From the point of view of duties, the act belongs to the sphere of right or wrong; from the point of view of rights, it belongs to the sphere of justice or injustice. But this double aspect exists in truth in all cases. There are no duties without rights, any more than there are rights without duties. There is, therefore, no rule of right which is not at the same time in truth a rule of justice, and there is no wrong which is not also in truth an injustice. But the one aspect or point of view is sometimes more natural or more illuminating than the other. Sometimes, therefore, rights come into the foreground of thought and speech, and sometimes duties.

We may test the matter by considering the nature of those alleged duties of right which are not also duties of justice. They are of three classes: (1) self-regarding duties as opposed to duties towards others; (2) duties to the public as opposed to duties to individuals; (3) imperfect duties as opposed to perfect duties.

Self-regarding duties. As to the first of these, if the foregoing attempt to explain the essential nature of the rule of right is accepted as substantially correct, it follows that a man owes no duties to himself. Self-interest falls within the rule of wisdom, not within the rule of right. The rule of right relates to the effects of a man's actions, not upon himself, but upon others. For Robinson Crusoe on his island, remote from mankind, his acts were neither right nor wrong, just nor unjust; they were merely wise as conducing to his own interest, or foolish as being contrary to it. The conception of right and wrong, justice and injustice, has its source in the conflict between the interests and desires of the individual and those of other men, and the sole business of the rule of right or justice is to adjudicate between these conflicting interests and to allot to every man his own. Temperance, frugality, industry, the care of a man's own health, so far as they are duties, are duties which he owes not to himself, but to those dependent on him or to the community at large. *Quoad se ipsum* they are not duties at all, but counsels of practical wisdom. The rule of wisdom may, no less than the rule of right, form the subject of ethics or moral philosophy as the science of human conduct and character, but it is not itself a part of the rule of right. The so-called self-regarding duties, therefore, cannot be made the ground of any distinction between justice and the residue of right properly so called.

Duties to the community. In the second place, a distinction is drawn between duties to specified individuals and duties to the public at large. Duties of the first kind, it is said, correspond to rights vested in those individuals; but duties of the second kind correspond to no rights at all. Duties of the first kind, therefore, are duties of justice; but those of the second kind are merely duties of right in general. There is no doubt that this distinction conforms with substantial accuracy to the usages of speech. As already explained, however, it expresses a difference of point of view and not a difference of subject-matter. When a duty is owing not directly to any individual, but merely to the community at large, the corresponding right is vested in the community. A public nuisance is in truth a violation of the rights of the public, just as a private nuisance is a violation of the right of a private individual. The circumstance, however, that the right is not that of any single or ascertained person, but is merely that of the public at large, tends to concentrate attention on the duty broken rather than on the right violated. Conversely, in the other class of case, the right violated comes into the foreground of thought, inasmuch as it is the right of a single person, on whom the mischief of the breach of duty falls exclusively. In popular thought and speech, therefore, we naturally think and speak of breaches of duty in one class of case and of violations of rights in the other. But in substance and essence a duty to the community at large is no less a duty of justice than is a duty to an individual person.

Perfect and imperfect duties. In the third place, a distinction is often drawn between perfect and imperfect duties—the former alone falling within the sphere of justice. By a perfect duty is meant one which is *rightly enforceable*—one which is fit to be maintained by physical force, and therefore would be so maintained by a perfect system of civil law and legal justice. An imperfect duty, on the other hand, is an act which ought to be done in observance of the rule of right, but the doing of which should nevertheless be left to the free will of the actor, since it is not of such a nature as fits it for compulsory exaction by way of physical force. Such duties stand outside the scope of an ideal system of civil law. They are natural or moral duties which are not fit to be transformed into legal duties. Thus the duty to pay one's debts or to keep one's contracts is a perfect duty; for it is the business of any properly governed state and of any competent body of civil law to enforce such duties. They pertain, therefore, to the sphere of justice. But duties of charity, benevolence, or gratitude are imperfect. They are not fit for enforcement by the state or proper to be transformed into legal duties. Imperfect duties, it is said, have no rights corresponding to them, or, at all events, no perfect rights, or rights properly so called—for the essence of a right consists, it is said, in the rightful possibility of exaction by force. Therefore justice includes the sphere of perfect duties only. Imperfect duties pertain not to justice but to the domain of voluntary virtue.

The distinction so drawn between perfect and imperfect duties is, doubtless, one which possesses both logical validity and practical importance. It is certain that one part of the rule of natural right should be taken up into the sphere of legal right, and that the residue should remain outside. The civil law and the administration of public justice are not the proper guardians of the entire body of morality. The distinction, however, is subject to two criticisms. In the first place it is to be observed that the specific use of the term justice as denoting exclusively the sphere of perfect duties is not in conformity with established usage. Justice does not connote enforceability or consonance with an ideal system of civil law. It means, as already indicated, the due observance of rights, whether such rights are of a nature to be properly enforced by law or not. We speak of a father's treatment of his children as being unjust, without any thought of enforceability or of the civil law, whether actual or ideal. Natural or moral justice is natural or moral right in its whole compass, regarded from the point of view of the interests protected by it, rather than from that of the duties imposed by it—and this is so whether those rights and duties are regarded as properly enforceable or not.

The second criticism relates to the use which is sometimes made of this distinction between justice and other forms of right. Attempts have been made so to define justice in this sense that, by a process of deductive reasoning, conclusions may be reached as to the proper limits of the administration of justice in the state's courts, and of the interference of the legislature with private liberty. One of the most noteworthy of these attempts is that made by Herbert Spencer in his Principles of Ethics. He divides the sphere of ethics in the first place into two parts, dealing respectively with the so-called self-regarding duties and with duties towards others. The first part he calls the Ethics of Individual Life, and the second the Ethics of Social Life. He then proceeds to divide the latter into two parts, dealing respectively with Justice and Beneficence. Justice includes the perfect and rightly enforceable duties. This alone is the proper sphere of the law courts and the legislature. Beneficence, on the other hand, includes all imperfect and unenforceable duties. This is the domain of voluntary virtue, into which the civil law must not trespass. The distinction so drawn by him between justice and beneficence is not empirical. It purports to be a scientific boundary, and the scope of justice is to be deductively ascertained by reference to the definition of that form of right. His definition is essentially the same as that of Kant. Justice is that scheme of limitation of the liberty of the individual whereby "the liberty of each is limited only by the like liberties of all." The all-embracing formula of justice is (x): "Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man." All that goes beyond this in the operations of the legislature or of the law courts is trespass and usurpation—an unjustifiable transformation into legal justice of rules which pertain, not to the sphere of justice at all, but to the definitely contrasted sphere of voluntary well-doing. This is not the place for any critical examination of this or any other attempt so to limit deductively and scientifically the proper boundaries and territory of the civil law. It may be permissible, however, to express the opinion that neither by way of this principle of equal liberty, nor by way of any other substitute for it, is it possible to find a royal road by which we can attain deductively to any sound distinction between those duties which are fit for legal recognition and enforcement, and those which must properly be left within the domain of civil liberty. The most that can be hoped for is the formulation of principles as to the relative advantages and disadvantages of legal restraint on the one hand and natural liberty on the other, in order that the issue may be better judged in each individual instance in which it arises for decision.

(x) Principles of Ethics, II. p. 46.

Private and Public Justice. There remains for examination one further question. When we consider justice, not merely in its general aspect, but in its special aspect as administered and maintained by the tribunals of the state, it becomes manifest that it is of two kinds. Justice is either private or public. The former is a relation between individual persons —between man and man—while the latter is a relation between individual persons and a court of justice. The rule of private justice is concerned with the dealings of men with each other; the rule of public justice is concerned with the dealings of a judicial tribunal with those who come before it as subject to its jurisdiction. Private justice is that which the courts are appointed to *maintain* or *enforce;* public justice is that which they are appointed to *administer* or *dispense.* The former is maintained by the courts in the same sense in which the police force maintains the public peace; while the latter is administered by the courts in the same sense in which a physician administers drugs. Public justice is that which a plaintiff demands and receives from a judicial tribunal, because he has failed to obtain private justice from his antagonist; it is that which a criminal is brought before the tribunal to receive and suffer, because he has already violated private justice by his crime. Private justice is the end for whose sake the courts exist; public justice is the instrument by which they fulfil their functions. Where in Magna Carta it is provided that right and justice (*rectum et justitia*) shall not be sold, denied, or delayed, the right and justice intended is the public justice of the courts, not that private justice which determines the rights of the King's subjects as between themselves. The business of the courts is so to dispense public justice as to give to every man what he deserves by reason of some violation of private justice already done or suffered by him. It is public justice, not private justice, that carries the sword and the scales.

Public justice is of two kinds, being either criminal or civil. The nature of this distinction will be more fully considered at a later stage of this inquiry. It is sufficient here to say that criminal justice is *retributive*, whereas civil justice is *remedial*. Criminal or retributive justice gives to a wrongdoer what he deserves, in the way of punishment, for his infraction of the rule of private justice. Civil or remedial justice gives to a person who has been injured by a violation of private justice what he deserves by way of restitution or redress from him who has so injured him.

The distinction between natural and legal justice, which has been already considered by us, exists both within the sphere of public and within that of private justice. Rules of civil law exclude, so far as they extend, the *liberum arbitrium* of the courts both in determining the principles of that private justice which they are appointed to maintain, and in determining the principles of that retributive or remedial justice which they are appointed to administer. So far as the law so extends, both private and public justice fall within the domain of legal justice; so far as the law does not extend, the justice maintained and administered by the tribunals of the state is natural or moral justice.

SUMMARY.

Origin of the term Civil Law.
Various meanings of the term:
  1. The law of the land.
  2. Roman law.

   3. The residue of the law of the land after excepting a special part: *e.g.*, civil and criminal law, civil and military law.

Improper substitutes for the term civil law:
   1. Positive law.
   2. Municipal law.

The concrete and abstract senses of the term law:
   Law and a law
   Jus and *lex.*
   Droit and *loi.*

Legal and ethical senses of *jus* and *droit.*

Law defined as the rules applied by the courts in the administration of justice.

Nature of the administration of justice.
   Discretionary justice.
   Justice according to law.

Advantages of justice according to law.
   Its defects.

The imperative theory of law.
   Law as the command of the state.
   The partial truth of this theory.
   Its defects:
      1. No recognition of the relation between law and justice.
      2. No recognition of non-imperative rules of law.

The nature and sources of the authority of law over the law courts themselves.
   1. Its legal authority.
   2. Its ethical authority.

Justice:
   Natural or moral justice.
   Legal justice.

Rights and duties:
   Natural or moral rights and duties.
   Legal rights and duties.

Law:
   Natural or moral law.
   Civil law.

The imperative theory of natural law and justice:
   Theological.
   Secular.

Natural justice defined:
   The rule of justice—directed to the general good.
   The rule of self-regarding wisdom—directed to one's own good.

Whether natural justice the whole of natural right or one part of it only.

The alleged distinction between duties of justice and other duties.

Duties said not to be duties of justice:

1. Self-regarding duties.
2. Duties to the community at large.
3. Imperfect duties.

Justice the whole of right in one aspect—*i.e.*, as the due observance of rights.

Public and Private Justice:

Public Justice { Retributive—Criminal.
Remedial—Civil.

CHAPTER III.

CIVIL LAW (*continued*).

§ 20. Law and Fact.

It is commonly said that all questions which arise for consideration and determination in a court of justice are of two kinds, being either questions of law or questions of fact. In a sense this proposition is true, but it is one which requires careful examination, because both the term question of law and the term question of fact are ambiguous and possess more than one meaning.

The term question of law is used in three distinct though related senses. It means, in the first place, a question which the court is bound to answer in accordance with an already established rule of law—a question which the law itself can be shown to have authoritatively answered, to the exclusion of the right of the court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter. All other questions are questions of fact—using the term fact in its widest possible sense to include everything that is not purely law. In this sense, every question which has not been predetermined and authoritatively answered by the law is a question of fact—whether it is, or is not, one of fact in any narrower sense which may be possessed by that term. Thus the question as to what is the reasonable and proper punishment for murder is a question of law, individual judicial opinion being absolutely excluded by a fixed rule of law. But what is the proper and reasonable punishment for theft is (save so far as judicial discretion is limited by the statutory appointment of a fixed maximum) a question of fact on which the law has nothing to say. Whether a contractor has been guilty of unreasonable delay in building a house is a question of fact; the law contains no rule for its determination. But whether the holder of a bill of exchange has been guilty of unreasonable delay in giving notice of dishonour is a question of law to be determined in accordance with certain fixed principles laid down in the Bills of Exchange Act. The question whether a child accused of crime has sufficient mental capacity to be criminally responsible for his acts is one of fact, if the accused is over the age of seven years, but one of law (to be answered in the negative) if he is under that age. The Sale of Goods Act provides that "where by this Act any reference is made to a reasonable time, the question what is a reasonable time is a question of fact." This means that there is no rule of law laid down for its determination.

In a second and more usual signification, a question of law is a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter. Questions of law in this sense arise, not out of the existence of law, but out of its uncertainty. If the whole law was definitely ascertained, there would be no questions of law in this sense; but all questions to be answered in accordance with that law would still be questions of law in the former sense. When a question first arises in a court of justice as to the meaning of an ambiguous statutory provision, the question is one of law in this second sense; for, in being answered, it will dispose of an uncertainty as to what the law is. But it is not a question of law in the first sense, but a question of fact. The immediate business of the court is to determine what, in its own judgment and in fact, is the true meaning of the words used by the legislature. But when this question has once been judicially determined, the authoritative answer to it becomes a judicial precedent which is law for all other cases in which the same statutory provision comes in question. The question as to the meaning of the enactment has been transformed from one of fact into one of law in the first sense; for it has in all future cases to be answered in accordance with the authoritative interpretation so judicially placed upon the enactment. The judicial interpretation of a statute, therefore, represents a progressive transformation of the various questions of fact as to the meaning of that statute into questions of law (in the first sense) to be answered in conformity with the body of interpretative case-law so developed.

There is still another and third sense in which the expression question of law is used. This arises from the composite character of the typical English tribunal and the resulting division of judicial functions between a judge and a jury. The general rule is that questions of law (in both of the foregoing senses) are for the judge, but that questions of fact (that is to say, all other questions) are for the jury. This rule, however, is subject to numerous and important exceptions. Though there are no cases in which the law (in the sense, at least, of the general law of the land) is left to a jury, there are many questions of fact that are withdrawn from the cognisance of a jury and answered by the judge. The interpretation of a document, for example, may be, and very often is, a pure question of fact, and nevertheless falls within the province of a judge. So the question of reasonable and probable cause for a prosecution—which arises in actions for malicious prosecution—is one of fact and yet one for the judge himself. So it is the duty of the judge to decide whether there is any sufficient evidence to justify a verdict for the plaintiff; and if he decides that there is not, the case is withdrawn from the jury altogether; yet this is mere matter of fact, undetermined by any authoritative rule of law. By an illogical though convenient usage of speech, any question which is thus within the province of the judge instead of the jury is called a question of law, even though it may be in the proper sense a pure question of fact. It is called a question of law because it is committed to and answered by the authority which normally answers questions of law only.

We proceed now to consider more particularly the nature of questions of fact, already incidentally dealt with in connection with questions of law. The term question of fact has more than one meaning. In its most general sense it includes all questions which are not questions of law. Everything is matter of fact which is not matter of law. And, as the expression question of law has three distinct applications, it follows that a corresponding diversity exists in the application of the contrasted term. A question of fact, therefore, as opposed to a question of law, means either (1) any question which is not predetermined by an established rule of law; or (2) any question except a question as to what the law is; or (3) any question that is to be answered by the jury as opposed to the judge.

There is, however, a narrower and more specific sense, in which the expression question of fact does not include all questions that are not questions of law, but only some of them. In this sense a question of fact is opposed to a question of judicial discretion. The sphere of judicial discretion includes all questions as to what is right, just, equitable, or reasonable—so far as not predetermined by authoritative rules of law but committed to the *liberum arbitrium* of the courts. A question of judicial discretion pertains to the sphere of right, as opposed to that of fact in its stricter sense. It is a question as to what ought to be, as opposed to a question of what is. Matters of fact are capable of proof, and are the subject of evidence adduced for that purpose. Matters of right and judicial discretion are not the subject of evidence and demonstration, but of argument, and are submitted to the reason and conscience of the court. In determining questions of fact the court is seeking to ascertain the truth of the matter; in determining questions of judicial discretion it seeks to discover the right or justice of the matter. Whether the accused has committed the criminal act with which he is charged, is a question of fact; but whether, if guilty, he should be punished by way of imprisonment or only by way of fine, is a question of judicial discretion or of right. The Companies Act empowers the court to make an order for the winding-up of a company if (*inter alia*) the company is unable to pay its debts or the court is of opinion that it is just and equitable that the company should be wound up. The first of these questions is one of pure fact, whereas the second is a question of judicial discretion. The Divorce Court is empowered to grant divorce for adultery, and to make such provision as it may deem just and proper with respect to the custody of the children of the marriage. The question of adultery is one of fact; but the question of custody is one of right and judicial discretion.

Doubtless, in the wider sense of the term fact, a question whether an act is right or just or reasonable is no less a question of fact than the question whether that act has been done. But it is not a question of demonstrable fact to be dealt with by a purely intellectual process; it involves an exercise of the moral judgment, and it is therefore differentiated from questions of pure fact and separately classified (*a*).

Having regard to this distinction, all matters and questions which come before a court of justice are of three classes:—

(1) Matters and questions of law—that is to say, all that are to be determined by the application of legal principles;

(2) Matters and questions of judicial discretion—that is to say, all matters and questions as to what is right, just, equitable, or reasonable, except so far as determined by law;

(3) Matters and questions of fact—that is to say, all other matters and questions whatever.

In matters of the first kind, the duty of the court is to ascertain the rule of law and to decide in accordance with it. In matters of the second kind, its duty is to exercise its moral judgment, in order to ascertain the right and justice of the case. In matters of the third kind, its duty is to exercise its intellectual judgment on the evidence submitted to it in order to ascertain the truth. On the trial of a person accused of theft, for example, the question whether the act alleged to have been done by him amounts to the criminal offence of theft is a question of law, to be answered by the application of the rules which determine the scope and nature of the offence

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(*a*) It is worthy of observation that there is yet a third meaning of the expression question or matter of fact, in which it is contrasted with a question or matter of *opinion*. A question of fact is one capable of being answered by way of demonstration—a question of opinion is one that cannot be so answered—one the answer to which is a matter of speculation which cannot be proved by any available evidence to be right or wrong. The past history of a company's business is a matter of fact; but its prospects of successful business in the future is a matter of opinion. A prospectus which erroneously sets out the former, contains misrepresentations of fact; a prospectus which merely contains prophecies of future prosperity does not, for this is a matter of opinion, not of fact. This distinction is doubtless in the ultimate analysis merely one of degree, but it is one of practical importance in the law for some purposes. The distinction between matters of fact and matters of right, on the other hand, is a logical distinction of kind.

of theft and distinguish it from other offences, such as that of obtaining goods by false pretences; the question whether he has done the act so alleged against him is a question of fact, to be determined in accordance with the evidence; and the question as to what is the just and reasonable punishment to be imposed upon him for his offence is a question of right or judicial discretion, to be determined in accordance with the moral judgment of the court.

The existence and development of a legal system represents the transformation, to a greater or less extent, of questions of fact and of judicial discretion into questions of law in the first sense explained above, by the establishment of authoritative and predetermined answers to these questions. This process of transformation proceeds chiefly within the sphere of judicial discretion, and only to a smaller extent within the sphere of pure fact. In respect of questions as to what is just, right, and reasonable, the purpose and effect of a system of law is to exclude and supersede to a very large extent the individual moral judgment of the courts, and to compel them to determine these questions in accordance with fixed and authoritative principles which express the established and permanent moral judgment of the community at large. Natural or moral justice is to a very large extent transmuted into legal justice; *jus naturale* becomes *jus positivum*. The justice which courts of justice are appointed to administer becomes for the most part such justice as is recognised and approved by the law, and not such justice as commends itself to the courts themselves The sphere of judicial discretion is merely such portion of the sphere of right as has not been thus encroached upon by the sphere of law.

To a lesser extent, even questions of pure fact are similarly transformed into questions of law. Even to such questions the law will, on occasion, supply predetermined and authoritative answers. The law does not scruple, if need be, to say that the fact must be deemed to be such and such, whether it be so in truth or not. The law is the theory of things, as received and acted upon within the courts of justice, and this theory may or may not conform to the reality of things outside. The eye of the law does not infallibly see things as they are. Partly by deliberate design and partly by the errors and accidents of historical development, law and fact, legal theory and the truth of things, may fail in complete coincidence. We have ever to distinguish that which exists in deed and in truth from that which exists in law. Fraud in law, for example, may not be fraud in fact, and *vice versa*. That is to say, when the law lays down a principle determining, in any class of cases, what shall be deemed fraud and what shall not, this principle may or may not reflect the truth, and so far as it is untrue the truth of things is excluded by the legal theory of things.

This discordance between law and fact may come about in more ways than one. Its most frequent cause is the establishment of legal presumptions, whereby one fact is recognised by law as sufficient proof of another fact, whether it is in truth sufficient for that purpose or not. Such legal presumptions—*presumptiones juris*—are of two kinds, being either conclusive or rebuttable. A presumption of the first kind constrains the courts to infer the existence of one fact from the existence of another, even though this inference could be proved to be false. A presumption of the second kind requires the courts to draw such an inference even though there is no sufficient evidence to support it, provided only that there is no sufficient evidence to establish the contrary inference. Thus a negotiable instrument is presumed to be given for value, a person not heard of for seven years is presumed to be dead, and an accused person is presumed to be innocent. A fact which by virtue of a legal presumption is deemed by law to exist, whether it exists or not, is said in the technical language of the law to exist constructively or by construction of law. Constructive fraud or constructive notice, for example, means fraud or notice which is deemed to exist by virtue of an authoritative rule of law, whether it exists in truth or not.

Another method by which the law on occasion deliberately departs from the truth of things for sufficient or insufficient reasons, is the use of the device known as a legal fiction—*fictio juris*. This was a device familiar to primitive legal systems, though mostly fallen out of use in modern law (*b*). The most important legal fiction recognised by modern law is that of incorporation—the fiction by which a body of individual persons, such as a trading company, a university, or the population of a city, is regarded by law as being in itself a person, distinct from the individuals of which that body is composed, and capable as such of owning property, making contracts, incurring obligations, and otherwise doing and suffering what real persons can do and suffer. The nature and purpose of such fictitious legal personality will be considered fully at a later stage of this inquiry. Another important legal fiction recognised by modern systems is that of the adoption of children—a fiction which played a great part in the law of primitive communities. An adoptive child is a child who is not in fact the child of its adopting parent, but is deemed to be such by a legal fiction, with the same results in law as if this fictitious parentage was real (*c*).

A very large and important part of the legal system consists of that case-law which arises from the authoritative interpretation of statutes by the law courts. The whole of this law represents the transformation of questions of fact as to the meaning of statutes into questions of law to be answered for the future in accordance with the judicial precedents by which that meaning has been already authoritatively declared.

(*b*) See Maine's Ancient Law, ch. 2.

(*c*) In early law the purpose of most legal fictions was to alter indirectly and covertly a legal system so rigid that it could not be effectively altered in this respect by the direct and open process of legislation. The practical effect of any rule of law depends on the nature of the rule and on the nature of the facts to which it is applied. If the rule cannot itself be altered, its effect may be altered by establishing a legal fiction as to the nature of the facts. This device was familiar both to the law of Rome and in older days to the law of England. It usually assumed the form of fictitious allegations made in the pleadings in an action and not suffered to be contradicted. In Roman law foreigners were admitted to certain of the exclusive legal rights of Roman citizens by a fictitious allegation of citizenship, and in English law the old rule that the jurisdiction of English courts was limited to causes of action which arose in England was evaded by fictitious and non-traversable allegations that the foreign place in which the cause of action arose was situated in England. He who desired to enforce in the English courts a bond executed in France was permitted in his pleadings to allege a bond executed "at a certain place called Bordeaux in France in Islington in the County of Middlesex." "Whether there be such a place in Islington or no, is not traversable in that case." Co. Litt. 261. b.

This process of interpretation is to a large extent based on a legal fiction—the fiction, that is to say, that the questions which arise in the application of a statute were actually present to the mind of the legislature when the statute was passed, that the legislature really possessed an intention with respect to them, and that this intention is expressed in the words of the enactment. In most cases in which a statute gives rise to any doubts or difficulties requiring judicial solution by way of interpretation, this assumption is unfounded. The difficulty has arisen because the legislature had not in truth any coherent and complete intention at all. What the courts in reality do in interpreting an ambiguous, inconsistent, or otherwise imperfect enactment, is to consider and determine what the legislative intention would have been had the particular point been presented to the mind and attention of the legislature. But this presumed and constructive intention of the legislature can only be gathered from judicial consideration as to what is just and reasonable. Under the guise of determining what a statute does in fact say and mean, the courts, in all matters in which the statute is put to silence by its ambiguities, omissions, or inconsistencies, supplement the expressed intention of the legislature by reading into the statute the rules of justice, reason, and public policy, so far as consistent with that expressed intention. The case-law created by the process of statutory interpretation must to a large extent, therefore, be regarded as an authoritative judicial expression of those rules of justice, reason, and public policy, rather than as an authentic ascertainment of the actual facts as to the intention of the legislature.

The same question may be partly one of law and partly one of fact or judicial discretion. This is so in two senses. In the first place, the question may be in reality composite, consisting of two or more questions combined, and the several components may be of different natures in this respect. The question, for example, whether a partnership exists between A and B is partly one of fact (*viz.*, what agreement has been made between them) and partly one of law (*viz.*, whether such an agreement is sufficient to constitute the legal relation of partnership). Similar composite questions are innumerable.

In the second place, there are many cases in which the freedom of judicial discretion on any point is not wholly taken away by a fixed rule of law, but is merely restrained and limited by such a rule, and is left to operate within the restricted sphere so allowed to it. In such a case the question to be determined by the court is one of law so far as the law goes, and one of fact or judicial discretion as to the rest. The proper penalty for an offence is usually a question of this nature. The law imposes a fixed maximum, but leaves the discretion of the court to operate within the limits so appointed. So, in many cases, judicial discretion, instead of being excluded, is merely limited and controlled by rules of law which determine the general considerations which are to be taken into account as relevant and material in the exercise of this discretion. The discretion of the court has not been taken away, but it must be exercised within the limits, in the manner, and upon the considerations thus authoritatively indicated by law.

§ 21. The Territorial Nature of Law.

We have defined the law as consisting of the rules recognised and acted upon by the courts in administering justice. It is to the courts, therefore, that we must go in order to ascertain what the law is, and a system of law is the whole body of legal doctrine recognised and applied by one and the same court in the exercise of its judicial functions. If this were all—if this were a complete account of the matter—each system of law would be regarded and known as the law of the particular court to which it so belongs. We should speak of the law of the Court of King's Bench or of Chancery in London, and of the law of the Court of Session in Edinburgh. In fact, however, this is neither the legal nor the popular usage of speech, save where it is rendered necessary by special considerations arising from the concurrent existence of different systems of law administered by the same courts within the same territory. Commonly we speak not of the law of a court but of the law of a country. We speak not of the law of the Court of King's Bench or Common Pleas but of the law of England; and not of the law of the Court of Session but of the law of Scotland. We speak of a system of law as belonging to and in force in some defined territory, and not as belonging to and being in force in some particular court of justice. The law is conceived and spoken of as territorial. It is necessary, therefore, to consider the true significance of this territorial aspect and nature of a legal system. What is meant by saying that the system of law recognised and administered by the High Court of Justice in London is the law of England and is in force in England, and that the law in accordance with which the Court of Session in Edinburgh exercises its judicial functions is the law of Scotland and is in force in Scotland?

The territory to which a system of law is so attributed is not necessarily coincident with the territory of the State whose courts administer it or whose legislature makes it. No law is in force, as a system of territorial law, outside the territory of the state whose law it is; but it is not necessarily in force throughout the whole of that territory. The territory of a legal system may be, and very often is, only a portion of the territory of the state. The law of England and the law of Scotland are both the law of the same state, and are both in force in the territory of that state; but they are in force in different parts of it. The same state may possess different bodies of law in force as the territorial law of different portions of the state's territory, and concurrently therewith there may exist a body of common territorial law in force equally throughout all of those portions. The territorial nature and aspect of the law therefore, cannot be explained by saying that each system of law is attributed to the territory of that state by whose courts the law is recognised and administered.

The proposition that a system of law is in force in or belongs to a defined territory means that normally, in the absence of special circumstances, it applies to all persons, things, acts, and events within that territory, and does not apply to persons, things, acts, or events elsewhere. The criminal law of the English courts is said to be the criminal law of England, because normally it applies to all offences committed in England, and does not apply to offences elsewhere. It is true that to this general rule there are many exceptions. There are many offences with which English courts will deal and to which they will apply English law, though committed elsewhere than in England: offences, for example, committed on board British ships on the high seas, and treason, murder or bigamy committed by British subjects in any part of the world. These exceptions, however, do not essentially affect the general principle that the criminal law is territorial in its nature and application. Similarly, the land-law of English courts applies only to land situated in England, and is not a universal non-territorial doctrine applied by those courts in suits relating to land situated elsewhere. Substantially this is so with respect to other forms of property also. So the law of marriage, divorce, succession, and domestic relations is not applied by English courts to all the world, but only to those persons who by residence, domicile, or otherwise, are sufficiently connected with the territory of England. The law of contracts and of torts, on the other hand, knows comparatively little of any territorial limitation. If an action for damages for negligence or other wrongful injury committed abroad is brought in an English court, it will in general be determined in accordance with English law and not otherwise. Finally, the English law of procedure is in hardly any respect territorial. It is the law of English courts rather than the law of England. It is the same for all litigants who come before those courts, whatever may be the territorial connections of the litigants or of their cause of action. Yet notwithstanding the existence of numerous and important exceptions to the general rule, the law of English courts is essentially and in the main territorial in its application, in the sense that it is appointed only for such persons, property, acts, and events as possess the requisite connection with the realm of England. In this sense the law of the English courts is the law of England, and is in force in England and not elsewhere. It is the law of the land—*lex terrae* (*d*).

(*d*) An expression as old as Magna Carta: *Nisi per legale judicium parium vel per legem terrae.* There has been some learned discussion as to the meaning of "lex terrae" as so used, but there seems no real doubt that it is merely a synonym for "lex regni Angliae." See Holdsworth's History of English law, vol. I. p. 60 (3rd ed.).

This territorial quality of a system of law is not necessary or universal. It is not part of the essence or definition of a legal system. A system of law is readily conceivable which is not in this sense the law of the land. It may be personal rather than territorial in its application. Its application may be limited and determined not by reference to territorial considerations, but by reference to the personal qualifications of the individuals over whom jurisdiction is exercised: qualifications such as nationality, race or religion. The law of English courts might conceivably be the personal law of Englishmen—of British subjects—rather than the territorial law of England. The history of early law shows us such systems of personal law actually existing. The early law administered by the courts of Rome was, in the main, not the territorial law of Rome, but the personal law of the Romans. Foreigners had no part in it. It was the *jus civile*, the law of the *cives*. It was only by a process of historical development that the *jus gentium* was superadded to the *jus civile* as applicable to *cives* and *peregrini* equally. In Europe, after the dissolution of the Western Roman Empire, the laws were to a large extent conceived as personal rather than territorial, the members of each race or nationality living by their own national laws. A similar process of thought and practice is observable even at the present day in the ex-territorial administration of the national laws of European States in the consular courts of the East. The law administered by an English consular court abroad is to be regarded rather as the personal law of Englishmen, than as being in any proper or intelligible sense the territorial law of England (*e*).

§ 22. Law and Equity.

Until the year 1873, England presented the extremely curious spectacle of two distinct and rival systems of law, administered at the same time by different tribunals. These systems were distinguished as common law and equity, or

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(*e*) It is one of the misfortunes of legal nomenclature that there is no suitable and recognised term by which to denote the territorial area within which any system of territorial law is in force. Dicey in his Conflict of Laws uses the term country for this purpose.

merely as law and equity (using the term law in a narrow sense as including only one of the two systems). The common law was the older, being coeval with the rise of royal justice in England, and it was administered in the older courts, namely, the King's Bench, the Court of Common Pleas, and the Exchequer. Equity was the more modern body of legal doctrine, developed and administered by the Chancellor in the Court of Chancery as supplementary to, and corrective of, the older law. To a large extent the two systems were identical and harmonious, for it was a maxim of the Chancery that equity follows the law (*Aequitas sequitur legem*); that is to say, the rules already established in the older courts were adopted by the Chancellors and incorporated into the system of equity, unless there was some sufficient reason for their rejection or modification. In no small measure, however, law and equity were discordant, applying different rules to the same subject-matter. The same case would be decided in one way, if brought before the Court of King's Bench, and in another, if adjudged in Chancery. The Judicature Act, 1873, put an end to this anomalous state of things, by the abolition of all portions of the common law which conflicted with equity, and by the consequent fusion of the two systems into a single and self-consistent body of law administered in a single court called the High Court of Justice and substituted for the old courts of common law and the Court of Chancery (*f*).

Although the distinction between common law and equity has thus become to a large extent historical merely, it has not ceased to demand attention, for it is still valid and operative for many purposes. The so-called fusion of law and equity effected by the Judicature Act has abolished only such rules of the common law as were in conflict with the rules of equity, in the sense that both rules could not be recognised and applied in one and the same court of justice. So far as common law and equity are consistent with each other and so capable of being administered concurrently in a single court,

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(*f*) Judicature Act, 1873, § 25: "In all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."

these two systems still subsist, and the distinction between them is still in force. Thus the distinction between legal and equitable ownership, legal and equitable rights, legal and equitable remedies, remains an essential part of the modern system. It is still the case that one person may be the legal owner of property and another the equitable owner of the same property, as in the case of a trustee and his beneficiary. Similarly, a mortgage or charge may still be either legal or equitable. These distinctions between law and equity are not conflicts between two irreconcilable systems of law, but are such as to be capable of recognition as part of one and the same system. A legal right and an equitable right, legal ownership and equitable ownership, although as a matter of history they originated in different courts and in different legal systems, are now two different kinds of rights and of ownership recognised in the same court administering a single and harmonious legal system.

The term equity possesses at least three distinct though related senses. In the first of these, it is nothing more than a synonym for natural justice. *Aequitas* is *aequalitas*—the fair, impartial, or equal allotment of good and evil—the virtue which gives to every man his own. This is the popular application of the term, and possesses no special juridical significance.

In a second and legal sense equity means natural justice, not simply, but in a special aspect; that is to say, as opposed to the rigour of inflexible rules of law. *Aequitas* is contrasted with *summum jus*, or *strictum jus*, or the *rigor juris*. For the law lays down general principles, taking of necessity no account of the special circumstances of individual cases in which such generality may work injustice. So, also, the law may with defective foresight have omitted to provide at all for the case in hand, and therefore supplies no remedy for the aggrieved suitor. In all such cases, in order to avoid injustice, it may be considered needful to go beyond the law, or even contrary to the law, and to administer justice in accordance with the dictates of natural reason. This it is, that is meant by administering equity as opposed to law; and so far as any tribunal possesses the power of thus supplementing or rejecting the rules of law in special cases, it is, in this sense of the term, a court of equity, as opposed to a court of law.

The distinction thus indicated was received in the juridical theory both of the Greeks and the Romans. Aristotle defines equity as the correction of the law where it is defective on account of its generality (*g*), and the definition is constantly repeated by later writers. Elsewhere he says (*h*): "An arbitrator decides in accordance with equity, a judge in accordance with law; and it was for this purpose that arbitration was introduced, namely, that equity might prevail." In the writings of Cicero we find frequent references to the distinction between *aequitas* and *jus*. He quotes as already proverbial the saying, *Summum jus summa injuria* (*i*), meaning by *summum jus* the rigour of the law untempered by equity. Numerous indications of the same conception are to be met with in the writings of the Roman jurists (*k*).

The doctrine passed from Greek and Latin literature into the traditional jurisprudence of the Middle Ages. We may see, for example, a discussion of the matter in the *Tractatus de Legibus* of Aquinas (*l*). It was well known, therefore, to the lawyers who laid the foundations of our own legal system, and like other portions of scholastic doctrine, it passed into the English law courts of the thirteenth century. There is good reason for concluding that the King's courts of that day

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(*g*) Nic. Ethics V. 10. 3. The Greeks knew equity under the name *epieikeia.*

(*h*) Rhet. I. 13. 19.

(*i*) De Officiis I. 10. 33. See also Pro Caecina 23, 65: Ex aequo et bono, non ex callido versutoque jure rem judicari oportere. De Oratore 1. 56. 240: Multa pro aequitate contra jus dicere. De Officiis III. 16. 67.

(*k*) In omnibus quidem, maxime tamen in jure, aequitas spectanda est. D 50. 17. 90. Placuit in omnibus rebus praecipuam esse justitiae aequitatisque, quam stricti juris rationem. C. 3. 1. 8. Haec aequitas suggerit, etsi jure deficiamur. D. 39. 3. 2. 5. A constitution of Constantine inserted in Justinian's Code, however, prohibits all inferior courts from substituting equity for strict law, and claims for the emperor alone the right of thus departing from the rigour of the *jus scriptum*: Inter aequitatem jusque interpositam interpretationem nobis solis et oportet et licet inspicere. C. i. 14. 1.

(*l*) Summa Theologiae 2. 2. q. 120. art. 1. De epieikeia seu aequitate: in his ergo et similibus casibus malum est sequi legem positam; bonum autem est praetermissis verbis legis, sequi id quod poscit justitiae ratio et communis utilitas. Et ad hoc ordinatur epieikeia, quae apud nos dicitur aequitas.

did not consider themselves so straitly bound by statute, custom, or precedent, as to be incapable upon occasion of doing justice that went beyond the law (*m*). It was not until later that the common law so hardened into an inflexible and inexpansive system of *strictum jus*, that *aequitas* fled from the older courts to the newly-established tribunal of the Chancellor.

The Court of Chancery, an offshoot from the King's Council, was established to administer the equity which the common law had rejected, and of which the common law courts had declared themselves incapable. It provided an appeal from the rigid, narrow, and technical rules of the King's courts of law, to the conscience and equity of the King himself, speaking by the mouth of his Chancellor. The King was the source and fountain of justice. The administration of justice was part of the royal prerogative, and the exercise of it had been delegated by the King to his servants, the judges. These judges held themselves bound by the inflexible rules established in their courts, but not so the King. A subject might have recourse, therefore, to the natural justice of the King, if distrustful of the legal justice of the King's courts. Here he could obtain *aequitas*, if the *strictum jus* of the law courts was insufficient for his necessities. This equitable jurisdiction of the Crown, after having been exercised for a time by the King's Council, was subsequently delegated to the Chancellor, who, as exercising it, was deemed to be the keeper of the royal conscience.

We have now reached a position from which we can see how the term equity acquired its third and last signification. In this sense, which is peculiar to English nomenclature, it is no longer opposed to law, but is itself a particular kind of law. It is that body of law which is administered in the

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(*m*) Pollock and Maitland, History of English Law, I 168 (1st ed.); Glanville VII. 1; Aliquando tamen super hoc ultimo casu in curia domini Regis de consilio curiae ita ex aequitate consideratum est. Bracton, in discussing the various meanings of *jus*, says (f. 3. a.): Quandoque pro rigore juris, ut cum dividitur inter jus et aequitatem. Following Azo, who follows Cicero (Topica IV. 23), he says: Aequitas autem est rerum convenientia, quae in paribus causis paria desiderat jura (f. 3. a.). See also f. 12 b. and f. 23. b. Aequitas tamen sibi locum vindicat in hac parte. See also Y. B. 30 and 31 Ed. I. 121: Et hoc plus de rigore quam de aequitate.

Court of Chancery, as contrasted with the other and rival system administered in the common law courts. Equity is Chancery law as opposed to the common law. The equity of the Chancery has changed its nature and meaning. It was not originally law at all, but natural justice. The Chancellor, in the first days of his equitable jurisdiction, did not go about to set up and administer a new form of law, standing side by side with that already recognised in the Court of Common Pleas. His purpose was to administer justice without law, and this purpose he in fact fulfilled for many a day. In its origin the jurisdiction of the Chancellor was unfettered by any rules whatever. His duty was to do that "which justice, and reason, and good faith, and good conscience require in the case" (*n*). And of such requirements he was in each particular case to judge at his own good pleasure. In due time, however, there commenced that process of the encroachment of established principle upon judicial discretion which marks the growth of all legal systems. By degrees the Chancellor suffered himself to be restricted by rule and precedent in his interpretation and execution of the dictates of the royal conscience. Just in so far as this change proceeded, the system administered in Chancery ceased to be a system of equity in the original sense, and became the same in essence as the common law itself. The final result was the establishment in England of a second system of law, standing over against the older law, in many respects an improvement on it, yet, no less than it, a scheme of rigid, technical, predetermined principles. And the law thus developed was called equity, because it was in equity that it had its source.

Closely analogous to this equity-law of the English Chancellor is the *jus praetorium* of the Roman praetor. The praetor, the supreme judicial magistrate of the Roman republic, had much the same power as the Chancellor of supplying and correcting the deficiencies and errors of the older law, by recourse to *aequitas*. Just as the exercise of this power gave rise in England to a body of Chancery law,

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(*n*) Cited in Spence's Equitable Jurisdiction of the Court of Chancery, I. 408, note (*a*).

standing by the side of the common law, so in Rome a *jus praetorium* grew up distinct from the older *just civile*. "Jus praetorium," says Papinian (*o*), "est quod praetores introduxerunt, adjuvandi vel supplendi vel corrigendi juris civilis gratia, propter utilitatem publicam." The chief distinction between the Roman and the English cases is that at Rome the two systems of law co-existed in the same court, the *jus praetorium* practically superseding the *jus civile* so far as inconsistent with it; whereas in England, as we have seen, law and equity were administered by distinct tribunals. Moreover, although the *jus praetorium* had its source in the *aequitas* of the praetor, it does not seem that this body of law was ever itself called *aequitas*. This transference of meaning is peculiar to English usage (*p*).

§ 23. General Law and Special Law.

The whole body of the law—the entire *corpus juris*—may be conveniently regarded as divided into two parts which may be suitably distinguished as general law and special law. The former consists of the general or ordinary law of the land. The latter consists of certain other bodies of legal rules which are so special and exceptional in their nature, sources, or application that it is convenient to treat them as standing outside the general and ordinary law, as derogating from or supplementing it in special cases but not forming a constituent part of it. The distinction so drawn is probably not one which will stand the test of minute logical analysis, and its application has been to some extent perverted by the accidents of legal history and has varied from time to time in the course of legal development. It is to some extent a matter of merely arbitrary classification whether we regard certain rules as falling within the scope of the general law of

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(*o*) D. 1. 1. 7. 1.

(*p*) A special application by English lawyers of the term equity in its original sense, as opposed to *strictum jus*, is to be seen in the phrase, *the equity of a statute*. By this is meant the spirit of a law as opposed to its letter. A matter is said to fall within the equity of a statute when it is covered by the reason of the statute, although through defective draftsmanship it is not within its actual terms. "Valeat aequitas," says Cicero, "quae paribus in causis paria jura desiderat." Topica IV. 23.

the land, though exceptional in their nature, source, or application, or whether on the contrary we classify them as forming a special body of law having an independent existence, and operating within its own sphere of application as derogating from or supplementing the general law. Considerations of practical convenience, however, in respect of legal classification, exposition, and nomenclature justify the recognition of this distinction between the central or principal portion of the *corpus juris*, and the various bodies of legal doctrine that are merely subsidiary and accessory to it.

The chief forms of special law which may be thus recognised as standing outside the general law of the land are the following, which we shall consider in their order: 1. Local law; 2. Foreign law; 3. Conventional law; 4. Autonomic law; 5. Martial law; 6. International law as administered in prize courts.

1. *Local law.* In the first place, the general law is the law of the whole realm. It is in force throughout the entire territory of the English courts. Standing apart from this system of general territorial application are divers bodies of local law in force in particular portions of the realm only. Such local law is of two kinds, being either local customary law or local enacted law. Local customary law has its source in those immemorial customs which prevail in particular parts of England and have there the force of law in derogation of the general law of the land. Local enacted law, on the other hand, has its source in the local legislative authority of boroughs and other self-governing communities empowered to govern their own districts by by-laws supplementary to the general law. All such local customs and local laws are part of English law, since they are recognised and enforced in English courts; but they are not part of the general territorial law of England.

2. *Foreign law.* Another form of special law consists of those rules of foreign law which are on occasion applied, even in English courts, to the exclusion of the general law of England. Justice cannot be efficiently administered by tribunals which refuse on all occasions to recognise any law but their own. It is essential in many cases to take account

of some system of foreign law and to measure the rights and liabilities of litigants by it, rather than by the indigenous and territorial law of the tribunal itself. If, for example, two men make a contract in France and one of them sues on it in an English court, justice demands that in many respects the validity and effect of the contract shall be determined by French rather than by English law. French, instead of English, law will therefore be applied in such a case in English courts, in derogation of the general law. The principles which determine and regulate such substitution of foreign law for the law of England in English courts constitute the body of legal doctrine known as private international law.

Foreign law, so far as it is thus recognised in English courts, becomes by virtue of this recognition and application English law *pro re nata*, for English law is nothing but the body of principles recognised and applied by English courts in the administration of justice. But it is not part of the general law of England. It is, on the contrary, the territorial law of another country, substituted for the territorial law of England in special cases and on special considerations.

3. *Conventional law.* A third form of special law contrasted with and distinct from the general law of the land is that which may be suitably distinguished as conventional law. This is the law which has its source in the agreement of those who are subject to it. Agreement is a juristic fact having two aspects and capable of being looked at from two points of view. It is both a source of rights and a source of law. The former of those aspects is the more familiar, but on occasion and for some purposes it is convenient to have regard to the latter. General rules laid down in a contract, for the determination of the rights, duties, and liabilities of the parties *inter se*, may rightly be regarded as rules of law which those parties have agreed to substitute for or add to the rules of the general law. Agreement is a law for those who make it, which *pro tanto* supersedes, supplements, or derogates from the ordinary law of the land. *Modus et conventio vincunt legem.* To a large extent the general law is not peremptory and absolute, but consists of rules whose force is conditional on the absence of any other rules agreed upon by the parties interested. These

conventional rules are just as truly law as the general rules which they have superseded or supplemented. The articles of association of a company, for example, are just as much true rules of law, for the members of that company, as are the provisions of the Companies Act, or those statutory regulations which apply in the absence of any articles specially agreed upon. Similarly, articles of partnership fall within the definition of law, no less than the provisions of the Partnership Act which they supplement or modify, for both sets of rules are authoritative principles which the courts will apply in all litigation affecting the affairs of the partnership. But although such conventional law is true law *inter partes*, it is not a portion of the general law of the land. Like local law and foreign law, it stands outside the general system, for it is destitute of general application.

4. *Autonomic law.* Similar considerations apply to that form of special law which will be more fully dealt with in a subsequent chapter under the designation of autonomic law. By this is meant that species of enacted law which has its source in various forms of subordinate and restricted legislative authority possessed by private persons and bodies of persons. A railway company, for example, may make bye-laws for the regulation of its undertaking. A university may make statutes for the government of its members. An incorporated company can, by altering its articles, impose new rules and regulations upon dissentient shareholders. All rules so constituted by the exercise of autonomous powers of private legislation are true rules of law, for they will be recognised and applied as law in the courts of justice. But they are not incorporated as part of the general law of England.

5. *Martial law.* Yet another form of *jus speciale* standing apart from the general *lex terrae* is that which is known as martial law. This is the law which is applied by courts martial in the administration of military justice. Courts martial are the courts of the army. All other courts of justice are distinguished as civil, and the law applied by these civil courts in the administration of civil justice is distinguished from martial law as being civil law, in one of the senses of that term.

When in a later chapter we come to consider the nature of the state, we shall see that its primary and essential functions are war and the administration of justice. The army is that organ of the state by which it fulfils the first of these functions; while the courts of law, acting in conjunction with the appointed instruments for the execution of their judgments (such as the officers of police and of prisons) are the organs through which the state normally and in ordinary cases exercises its second function. Nevertheless, the division of these two functions between two distinct organs of the body politic is not complete. For the army itself exercises in certain cases the function of administering justice. The courts established within the army for this purpose are courts martial, and the law which these courts administer is martial law. To the extent therefore to which, in this abnormal fashion, the army assumes and exercises the functions of the civil judicature, we find military courts, military justice, and military law, standing side by side with civil courts, civil justice, and civil law.

Martial law is of three kinds. It is either (1) the law for the discipline and government of the army itself; or (2) the law by which the army in time of war governs foreign territory in its military occupation outside the realm; or (3) the law by which in time of war the army governs the realm itself in derogation of the civil law, so far as required by military necessity and the public safety.

The first form, that by which the army itself is disciplined and controlled, is commonly known by the specific title of military law, the two other forms being distinguished from it as being martial law in a narrow and specific sense. Historically and generically, however, the term martial law is properly applied to all three kinds. Military law is distinguished in three respects from the other forms of martial law. In the first place, it is in force in time of peace no less than in time of war, whereas the other forms are in force only in time of war. In the second place, military law applies only to the army itself, whereas the other forms of martial law apply to the civilian population also. In the third place, military law is of statutory authority, being contained in the Army Act and the rules and regulations made thereunder, whereas the other forms of martial law have their source in the royal prerogative, except so far as Parliament may from time to time, in view of the emergencies created by public or civil war, see fit to make special statutory provision in that behalf.

The second form of martial law is that by which the army, when it goes beyond the realm in time of war, governs any foreign territory of which it is in military occupation for the time being. Territory so held by the King's forces is governed autocratically by the royal prerogative, which is commonly exercised through the military commanders of the army of occupation. Save so far as the ordinary civil courts of the territory are permitted to continue their functions and to administer civil justice there in accordance with the ordinary territorial law, the justice administered in that territory is military justice administered by courts martial, and the martial law administered by these courts consists of the rules established by the good pleasure of the military authorities.

The third and last kind of martial law is that which is established and administered within the realm itself in derogation of the civil law, when a state of war exists within the realm, whether by way of invasion or by way of rebellion. The legality of such substitution of military for civil justice within the realm itself in time of war has been the subject of much difference of opinion. It is held by some that it is never lawful, unless expressly authorised by Act of Parliament and that the authority of the civil courts and the civil law is absolute in time of war no less than in time of peace. According to this view the exercise of military authority within the realm in time of war in derogation of the civil law is always illegal, whatever justification for it may exist in considerations of military necessity and the public safety, in the absence of statutory sanction, either precedent, or subsequent by way of Acts of indemnity and ratification. This is not the place in which this question can be adequately discussed. It is sufficient to say that the better opinion would seem to be, that even within the realm itself the existence of a state of war and of national danger justifies in law the temporary establish ment of a system of military government and military justice in derogation of the ordinary law of the land, in so far as this is reasonably deemed necessary for the public safety. To this extent and in this sense it is true that *inter arma leges silent.* The formal establishment of such a system of military government and justice in time of internal war or rebellion is commonly known as the proclamation of martial law. With the acts of military authorities done in pursuance of such a system the civil courts of law will not concern themselves in time of war; and even after peace has come again, the acts so done in time of war may be justified in the civil courts, so far as done in good faith and with reasonable cause in view of the real or apparent necessity which gave occasion to them (*q*).

6. *International law.* The last kind of special law which it is necessary to distinguish from the general law of the land is that portion of the law of nations which is administered in the prize courts of the state in time of war. In a former chapter we saw that international law, or the law of nations, consists of a body of rules established by the express or implied agreement of sovereign states for the regulation of their conduct towards each other. The rules of international law are not as such, and in general, recognised and administered by courts of justice as being also rules of civil law. The remedy for breaches of international law is not in general to be found in the law courts of the state. A treaty or other international agreement is not in general a contract which creates legal rights and obligations of which the courts of justice will take notice. It is true that to some extent civil law and international law deal with the same subject-matters, and that when this is so, identical or similar rules tend to be established concurrently in both systems. Both civil and international law, for example, find it necessary to determine the limits of jurisdiction and state authority on the high seas; and it is obviously expedient that these rules should be determined in the same way by both systems. But this

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(*q*) See *Ex parte Marais*, (1902) A. C. 109. As to the history of martial law see 18 L. Q. R. 117 : Martial Law Historically Considered, by W. S. Holdsworth. The student should also consult Keir and Lawson, Cases on Constitutional Law, pp. 368 *et seq*.

tendency of the civil law to conform more or less accurately to the international law on the same matter is a very different thing from the recognition of international law as having, *per se* or *proprio vigore*, the force and authority of civil law in the state's courts of justice. As a general rule it possesses no such force or authority. Nevertheless, there is one particular portion of the law of nations which is thus recognised by courts of justice as having—or as if having—in itself the force and nature of civil law also. It is that portion which regulates the practice of the capture of ships and cargoes at sea in time of war, and which is known as prize law. By a rule of international law, all states which desire to exercise this right of capture are under an obligation, while at war, to establish and maintain within their dominions certain courts called prize courts, whose function is to investigate the legality of all captures of ships or cargoes, and to administer justice as between the captors and all persons interested in the property seized. If the seizure is lawful, the property is condemned by those courts as lawful prize of war; and if unlawful, decrees are made for such restitution or redress as the law requires. Now a prize court is not an international tribunal; it is a court established by and belonging exclusively to the individual state by which the ships or cargoes have been taken. The prize court of England was formerly the Court of Admiralty, and is now the Probate, Divorce and Admiralty Division of the High Court of Justice. Nevertheless, the law which it is the essential duty and function of these courts to administer is the law of nations. It is considered to have its source in the agreement of sovereign states among themselves, and not in the legislative authority of the individual state to which the court belongs. But because of the fact that this portion of international law is thus recognised and applied by prize courts in the administration of the justice of those courts, it is also civil law—inasmuch as, or at any rate in so far as, civil law includes all rules, whatever their source, which are recognised and applied by the courts of justice of a state. Prize law, therefore, has a two-fold nature and aspect. It is international law, because made by international agreement; and it is at the same time civil law, in the sense that it governs the administration of justice in civil courts. Yet although prize law does to this extent possess the true nature of civil law, and is therefore to be considered as part of the entire body of English law, it is not part of the general law of the land. Its exceptional source and nature justify its separate classification as a form of *jus speciale* along with local law, foreign law, martial law, and the other forms that we have already dealt with.

The true nature of prize law as being essentially the law of nations, entitled *proprio vigore*, to be recognised and applied in prize courts as civil law, was authoritatively established by the decision of the Privy Council in the case of the *Zamora* during the war with Germany (r). It was unsuccessfully contended in that case that prize law as administered in English courts has its source in the royal prerogative, and that Orders in Council can establish for the prize courts such law as is thought proper in derogation of, or in substitution for, the established rules of international law. Lord Parker, delivering the judgment of the court, speaks as follows:

> "The law which the Prize Court is to administer is not the national law or, as it is sometimes called, the municipal law, but the law of nations—in other words, international law. . . . Of course the Prize Court is a municipal court, and its decrees and orders owe their validity to municipal law. The law it enforces may therefore in one sense be considered a branch of municipal law. Nevertheless the distinction between municipal and international law is well defined. A court which administers municipal law is bound by and gives effect to the law as laid down by the sovereign state which calls it into being. It need inquire only what that law is, but a court which administers international law must ascertain and give effect to a law which is not laid down by any particular state, but originates in the practice and usage long observed by civilised nations in their relations towards each other, or in express international agreement. . . . It cannot, of course, be disputed that a prize court, like any other court, is bound by the legislative enactments of its own sovereign state. A British prize court would certainly be bound by Acts of the Imperial Legislature. But it is none the less true that if the Imperial Legislature passed an Act the provisions of which were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering international law. It

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(r) (1916) 2 A. C. 77.

would, in the field covered by such provisions, be deprived of its proper function as a prize court" (*s*).

§ 24. The Common Law.

In the preceding section of this chapter we have seen that the entire *corpus juris*—the complete body of legal rules recognised and applied in English courts of justice—is divisible into two parts, which have been distinguished as the general law of the land and bodies of special law supplementing and derogating from the general law within the sphere of their special application. We have further considered in a summary manner the chief branches of this *jus speciale*, namely, local law, foreign law, conventional law, autonomic law, martial law, and the international law administered in prize courts. We have now to notice that the general law of England is itself divided into three parts, which are distinguished as statute law, equity, and common law. These three portions of the law are distinguished as derived from different sources. Statute law is that portion of the law which is derived from legislation, including in that term, not merely the legislation of Parliament, but also the exercise of subordinate and delegated legislative power under the authority of Parliament, as, for example, regulations made under a statute. It is enacted or written law (*jus scriptum*) as opposed to unenacted or unwritten law (*jus non scriptum*). Equity, on the other hand, is that system of law which had its origin in the Court of Chancery, and which has been already considered in a previous part of this chapter. It is a form of case law having its source in the judicial precedents of that court and of the modern courts by which the legal system of the Court of Chancery is now administered and developed. All the residue of the

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(*s*) In some of the earlier editions of this work the distinction between the general law of the land and systems of special law was based on the fact that judicial notice was taken of the former by the courts, as being the law normally applicable in the absence of any other law which, in the special case, had a better claim to application, whereas special law had to be proved by evidence: as in the case of customary, foreign, or conventional law. This view of the matter seems merely formal and superficial, and in any case the test of judicial notice does not always apply. Special courts take judicial notice of the *jus speciale* which they are appointed to administer.

general law of England, after thus excepting statute law and equity, is known as the common law. It is a form of case law having its source in the judicial decisions of the old courts of King's Bench, Common Pleas and Exchequer, and of the modern courts by which the system so established is now administered and developed. The case law, on the other hand, that is produced by way of the judicial interpretation of the statute law must itself be classed as forming part of the statute law from which it proceeds, for the purpose of this division of the law into statute law, equity, and common law. Common law and equity do not comprise the whole body of case law to be found in the law reports, but only that portion of case law that is derived from some other source than statutory interpretation. The case law derived from a statute is merely the statute itself, as authoritatively construed by the law courts.

The common law is the entire body of English law—the total *corpus juris Angliae*—with three exceptions, namely (1) statute law, (2) equity, (3) special law in its various forms. When, therefore, it is said that a certain rule is a rule of common law, the precise significance of the statement depends on the particular branch of law which for the purpose in hand is thus contrasted with the common law. We may mean that it is a rule of common law as opposed to a rule established by statute; or as opposed to a rule of equity; or as opposed to a rule of special law—for example, a local custom, or a rule of foreign law applied in exclusion of the law of England, or a rule of military or prize law, or a conventional rule established by the parties in derogation of the common law. It is not correct, however, to regard the term common law as possessing a number of different meanings and applications. It always denotes the same thing, namely the residue of the law after excepting statute law, equity, and special law. It is not true that common law sometimes means the whole law of England except statute law, and at other times means the whole law of England except equity. If it was used in the first of these senses, it would include equity; and if it was used in the second, it would include statute law. But this is not so. The term always, in its proper sense, excludes statute law, equity, and all the forms of special law; but sometimes the particular contrast intended to be expressed is that between common law and statute law: sometimes it is that between common law and equity: and sometimes it is that between common law and special law.

As opposed to equity the common law is not infrequently called law *simpliciter*. We speak of law and equity, rather than of common law and equity, notwithstanding the fact that equity is just as truly a branch of law as the common law itself. For in its origin equity was not law at all, but was *justitia naturalis* administered in Chancery to correct the defects or supply the deficiencies of that *strictum jus* which was administered in the King's courts of law.

In its historical origin the term common law (*jus commune*) was identical in meaning with the term general law as already defined. The *jus commune* was the general law of the land—the *lex terrae*—as opposed to *jus speciale*. By a process of historical development, however, the common law has now become, not the entire general law, but only the residue of that law after deducting equity and statute law. It is no longer possible, therefore, to use the expressions common law and general law as synonymous. How this came about in the case of equity is obvious. For equity was itself until modern times a typical form of *jus speciale*, and therefore outside the scope of the *jus commune*. It was a special system of law developed and administered by a special court in conflict with the general law of the land, just as martial law or prize law is to this day. By the Judicature Act, 1873, however, equity lost its character as a body of special law, and was united with the common law as a single harmonious system of general law administered in the same courts. The distinction between common law and equity still exists, but they are now two co-ordinate parts of a single system of general law, and no longer bear to each other that relation which made one of them general and the other special. Equity is now just as much part of the ordinary or general law of the land as is the common law itself. Nevertheless legal nomenclature has remained unchanged, and although equity has now become *jus commune* in truth, it has not acquired a title to that designation. Equity is a part of the general law, but not part of the common law.

The reason for the distinction between common law and statute law is not so easily intelligible. If *jus commune* meant originally merely the general law of the land, how is it that it does not include statute law? The explanation is apparently this, that statute law was originally conceived as a form of *jus speciale* derogating from the *jus commune*. A statute was *contra jus commune*, just as a local custom or the law of Chancery was. The general or common law of the land was conceived as a single, uniform, unchanging system of legal doctrine based on the immemorial customs of the realm, as authoritatively declared by the decisions of the King's courts and applied in all cases save where some different rule, drawn from some other source, prevailed over it. Legislation, no less than local custom, was accounted one of those sources of alien rules, forming no part of the general law, but breaking in upon the established doctrine of that law by way of exceptional interference *ab extra*.

In modern times, however, it is no longer possible in any proper scheme of legal classification or arrangement to take this ancient view of the relation between statute and common law. The immense development of statute law in modern times and its invasion of almost every portion of the old common law has made it impossible now to treat the common law as possessing any independent existence as a special and central portion of the *corpus juris*, subject merely to the exceptional interference of special statutory provisions possessing the same relation to it as local custom does. Common law and statute law must now be regarded as fused into a single system of general law, just as in the case of common law and equity. Indeed, a very large portion of the general law has its sole source in statute, and the residue of the common law is undergoing a slow transformation into statute law by the process known as codification. Yet although statute law must now be recognised in any logical and practicable scheme of legal classification as being part of the general law of the land, the older mode of thought is still to be traced in the persistence of the ancient usage of legal speech. Statute law, although it is part of the general law of the land, is still distinguished in name from the common law, just as equity is still distinguished from it.

The expression common law, *jus commune*, was adopted by English lawyers from the canonists, who used it to denote the general law of the Church as opposed to those divergent usages (*consuetudines*) which prevailed in different local jurisdictions, and superseded or modified within their own territorial limits the common law of Christendom. This canonical usage must have been familiar to the ecclesiastical judges of the English law courts of the twelfth and thirteenth centuries, and was adopted by them. We find the distinction between common law and special law (*commune ley* and *especial ley*) well established in the earliest Year Books (*t*).

SUMMARY.

Law and Fact.
Questions of law.
  Three meanings of the term:
    1. Questions to be answered in accordance with a rule of law.
    2. Questions as to what the law is.
    3. Questions to be answered by the judge instead of by the jury.
Questions of fact.
  The meanings of the term:
    1. As opposed to questions of law.
    2. As opposed to questions of right or judicial discretion.
All questions for judicial determination of three kinds:
  1. Questions of law, to be determined in accordance with fixed rules of law.

(*t*) Y. B. 20 and 21 Ed. I. 329. See Pollock and Maitland's History of English Law, I. 155 (2nd ed.). The term *jus commune* is found in Roman law also, but in senses unconnected with that which here concerns us. It sometimes signifies *jus naturale* as opposed to *jus civile* (D. 1. 1. 6. pr.), while at other times it is contrasted with *jus singulare*, that is to say anomalous rules of law inconsistent with general legal principles, but established *utilitatis causa* to serve some special need or occasion. D. 28. 6. 15; D. 1. 3. 16.

2. Questions of judicial discretion, to be determined in accordance with the moral judgment of the Court.
3. Questions of fact, to be determined in accordance with the evidence.

Transformation of questions of judicial discretion into questions of law by the development of authoritative rules of law.

Transformation of questions of fact into questions of law.
    Legal presumptions.
    Legal fictions.
    Statutory interpretation.

Questions of mixed law and fact.

The territorial nature of law. The law of the land.

Law and equity.
    The Court of Chancery and the Courts of Common Law.
    The meanings of the term equity:
        1. Natural justice in general.
        2. Natural justice in its special aspect, as opposed to the *strictum jus* of the law courts.
        3. The system of law developed and administered by the Court of Chancery.

General law and special law.
    General law the ordinary law of the land.
    Special law—accessory bodies of exceptional law derogating from or supplementing the ordinary law of the land.

Kinds of special law:
    1. Local law.
        (a) Local customary law.
        (b) Local enacted law—*e.g.*, by-laws.
    2. Foreign law—applied in English courts in accordance with the rules of private international law.
    3. Conventional law—made by agreement as law for the parties. *Modus et conventio vincunt legem.*
    4. Autonomic law—made by private authority in the exercise of subordinate legislative power: *e.g.*, the by-laws of a railway company or the statutes of a university.
    5. Martial law administered by courts martial:
        (a) Military law for the discipline of the army.
        (b) Martial law for the military government of foreign territory in military occupation.
        (c) Martial law within the realm in time of war. *Inter arma leges silent.*
    6. International law administered in the prize courts.

Common law:
    The entire *corpus juris* except—
        1. Statute law.

2. Equity.
3. Special law.

The general law of the land therefore consists of three parts:

1. Statute law.
2. Equity.
3. Common law.

Common law in its original sense identical with the general law of the land.

Equity formerly special law, now part of the general law.

Statute law formerly special law, now part of the general law.

Consequent distinction between common law and general law.

CHAPTER IV.

THE ADMINISTRATION OF JUSTICE.

§ 25. Necessity of the Administration of Justice.

"A HERD of wolves," it has been said (*a*), "is quieter and more at one than so many men, unless they all had one reason in them, or have one power over them." Unfortunately they have not one reason in them, each being moved by his own interests and passions; therefore the other alternative is the sole resource. For the cynical emphasis with which he insists upon this truth, the name and reputation of the philosopher Hobbes have suffered much. Yet his doctrine, however hyperbolically expressed, is true in substance. Man is by nature a fighting animal, and force is the *ultima ratio*, not of kings alone, but of all mankind. Without "a common power to keep them all in awe," it is impossible for men to cohere in any but the most primitive forms of society. Without it, civilisation is unattainable, injustice is unchecked and triumphant, and the life of man is, as the author of *Leviathan* tells us, "solitary, poor, nasty, brutish, and short (*b*)." However orderly a society may be, and to whatever extent men may appear to obey the law of reason rather than that of force, and to be bound together by the bonds of sympathy

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(*a*) Jeremy Taylor's Works, XIII. 306, Heber's ed.

(*b*) Hobbes' Leviathan, ch. 13 : "Hereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man. . . . Whatsoever therefore is consequent to a time of war, where every man is enemy to every man, the same is consequent to the time wherein men live without other security than what their own strength and their own invention shall furnish them withal. In such condition there is no place for industry . . . no arts, no letters, no society, and, which is worst of all, continual fear and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short."

rather than by those of physical constraint, the element of force is none the less present and operative. It has become partly or wholly latent, but it still exists. A society in which the power of the state is never called into actual exercise marks, not the disappearance of governmental control, but the final triumph and supremacy of it.

It has been thought and said by men of optimistic temper, that force as an instrument for the coercion of mankind is merely a temporary and provisional incident in the development of a perfect civilisation. We may well believe, indeed, that with the progress of civilisation we shall see the gradual cessation of the actual exercise of force, whether by way of the administration of justice or by way of war. To a large extent already, in all orderly societies, this element in the administration of justice has become merely latent; it is now for the most part sufficient for the state to declare the rights and duties of its subjects, without going beyond declaration to enforcement. In like manner the future may see a similar destiny overtake that international litigation which now so often proceeds to the extremity of war. The overwhelming power of the state, or of the international society of states, may be such as to render its mere existence a sufficient substitute for its exercise. But this, as already said, would be the perfection, not the disappearance, of the rule of force. The administration of justice by the state must be regarded as a permanent and essential element of civilisation, and as a device that admits of no substitute. Men being what they are, their conflicting interests, real or apparent, draw them in diverse ways; and their passions prompt them to the maintenance of these interests by all methods possible, notably by that method of private force to which the public force is the only adequate reply.

The constraint of public opinion is a valuable and, indeed, indispensable supplement to that of law, but an entirely insufficient substitute for it. The relation between these two is one of mutual dependence. If the administration of justice requires for its efficiency the support of a healthy national conscience, that conscience is in its turn equally dependent on the protection of the law and the public force. A coercive system based on public opinion alone, no less than one based on force alone, contains within itself elements of weakness that would be speedily fatal to efficiency and permanence. The influence of the public censure is least felt by those who need it most. The law of force is appointed, as all law should be, not for the just but for the unjust; while the law of opinion is set rather for the former than for the latter, and may be defied with a large measure of impunity by determined evildoers. The rewards of successful iniquity are upon occasion very great; so much so that any law which would prevail against it, must have sterner sanctions at its back than any known to the public censure. It is also to be observed that the influence of the national conscience, unsupported by that of the national force, would be counteracted in any but the smallest and most homogeneous societies by the internal growth of smaller societies or associations possessing separate interests and separate antagonistic consciences of their own. It is certain that a man cares more for the opinion of his friends and immediate associates, than for that of all the world besides. The censure of ten thousand may be outweighed by the approval of ten. The honour of thieves finds its sanction and support in a law of professional opinion, which is opposed to, and prevails over, that of national opinion. The social sanction, therefore, is an efficient instrument only so far as it is associated with, and supplemented by, the concentrated and irresistible force of the incorporate community. Men being what they are—each keen to see his own interest and passionate to follow it—society can exist only under the shelter of the state, and the law and justice of the state is a permanent and necessary condition of peace, order, and civilisation.

§ 26. Origin of the Administration of Justice.

The administration of justice is the modern and civilised substitute for the primitive practices of private vengeance and violent self-help. In the beginning a man redressed his wrongs and avenged himself upon his enemies by his own hand.

aided, if need be, by the hands of his friends and kinsmen; but at the present day he is defended by the sword of the state. For the expression of this and other elements involved in the establishment of political government, we may make use of the contrast, familiar to the philosophy of the seventeenth and eighteenth centuries, between the civil state and the state of nature. This state of nature is now commonly rejected as one of the fictions which flourished in the era of the social contract, but such treatment is needlessly severe. The term certainly became associated with much false or exaggerated doctrine touching the golden age, on the one hand, and the *bellum omnium contra omnes* of Hobbes, on the other, but in itself it nevertheless affords a convenient mode for the expression of an undoubted truth. As long as there have been men, there has probably been some form of human society. The state of nature, therefore, is not the absence of society, but the absence of a society so organised on the basis of physical force, as to constitute a state. Though human society is coeval with mankind, the rise of political society, properly so called, is an event in human history.

One of the most important elements, then, in the transition from the natural to the civil state is the substitution of the force of the incorporate community for the force of individuals, as the instrument of the redress and punishment of injuries. Private vengeance is transmuted into the administration of criminal justice; while civil justice takes the place of violent self-help. As Locke says (*c*), in the state of nature the law of nature is alone in force, and every man is in his own case charged with the execution of it. In the civil state, on the other hand, the law of nature is supplemented by the civil law, and the maintenance of the latter by the force of the organised community renders unnecessary and unpermissible the maintenance of the former by the forces of private men. The evils of the earlier system were too great and obvious to escape recognition even in the most primitive communities. Every man was constituted by it a judge in his own cause, and might was made the sole measure of right. Nevertheless

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(*c*) Treatise on Government, II. ch. 2.

the substitution was effected only with difficulty and by slow degrees. The turbulent spirits of early society did not readily abandon the liberty of fighting out their quarrels, or submit with good grace to the arbitrament of the tribunals of the state. There is much evidence that the administration of justice was in the earlier stages of its development merely a choice of peaceable arbitration, offered for the voluntary acceptance of the parties, rather than a compulsory substitute for self-help and private war. Only later, with the gradual growth of the power of government, did the state venture to suppress with the strong hand the ancient and barbarous system, and to lay down the peremptory principle that all quarrels were to be brought for settlement to the courts of law.

All early codes show us traces of the hesitating and gradual method in which the voice and force of the state became the exclusive instruments of the declaration and enforcement of justice. Trial by battle, which endured in the law of England until the beginning of the nineteenth century (*d*), is doubtless a relic of the days when fighting was the approved method of settling a dispute, and the right and power of the state went merely to the regulation, not to the suppression, of this right and duty of every man to help and guard himself by his own hand. In later theory, indeed, this mode of trial was classed with the ordeal as *judicium Dei*—the judgment of Heaven as to the merits of the case, made manifest by the victory of the right. But this explanation was an afterthought; it was applied to public war, as the litigation of nations, no less than to the judicial duel, and it is not the root of either practice. Among the laws of the Saxon kings we find no absolute prohibition of private vengeance, but merely its regulation and restriction (*e*). In due measure and in fitting manner it was

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(*d*) In the year 1818 in a private prosecution for murder (an appeal of murder) the accused demanded to be tried by battle, and the claim was allowed by the Court of King's Bench. The prosecutor was not prepared to face the risks of this mode of litigation, and the accused was discharged: *Ashford* v. *Thornton*, 1 Barn. & Ald. 405. This case led to the abolition of appeals of felony and of trial by battle by the statute 59 Geo. III. c. 46.

(*e*) Laws of King Alfred, 42. (Thorpe's Ancient Laws and Institutes of England, I. 91): "We also command that he who knows his foe to be at home fight not before he demand justice of him. If he have such power that he can beset his foe and besiege him, let him keep him within for seven days, the right of every man to do for himself that which in modern times is done for him by the state. As royal justice grows in strength, however, the law begins to speak in another tone, and we see the establishment of the modern theory of the exclusive administration of justice by the tribunals of the state (*f*).

§ 27. Civil and Criminal Justice.

The administration of justice has been already defined as the maintenance of right within a political community by means of the physical force of the state. It is the application by the state of the sanction of force to the rule of right. We have now to notice that it is divisible into two parts, which are distinguished as the administration of civil and that of criminal justice. In applying the sanction of physical force to the rules of right, the tribunals of the state may act in one or other of two different ways. They may either enforce rights or punish wrongs. In other words, they may either compel a man to perform the duty which he owes, or they

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and attack him not, if he will remain within. . . But if he have not sufficient power to besiege him, let him ride to the ealdorman, and beg aid of him. If he will not aid him, let him ride to the king before he fights."

(*f*) As late as the closing years of Henry III. it was found necessary to resort to special statutory enactments against a lawless recurrence to the older system. The statute of Marlborough (52 Hen. III. c. 1) recites that "At the time of a commotion late stirred up within this realm, and also since, many great men and divers other have disdained to accept justice from the King and his Court, like as they ought and were wont in time of the King's noble progenitors, and also in his time, but took great revenges and distresses of their neighbours and of others, until they had amends and fines at their own pleasure." The statute thereupon provides that "All persons, as well of high as of low estate, shall receive justice in the King's Court, and none from henceforth shall take any such revenge or distress of his own authority without award of our Court." Long after the strength of the law of England had succeeded in suppressing the practice, the right of private war continued to be recognised and regulated by law in the more feebly governed states of the Continent. An interesting account of the matter is given by M. Nys in his Origines du Droit International (1894), ch. 5. According to the former theory and practice of the criminal law of England, all crimes of violence were regarded and treated as breaches of the King's peace. A criminal was charged in the indictment with having committed murder or robbery "against the peace of our Lord the King." The King of England made good at an early date his monopoly of war, and all private war or violence was a violation of his peace. As to the King's peace, see Sir F. Pollock's Oxford Lectures, pp. 65-90; Select Essays in Anglo-American Legal History, II. pp. 403-417. An interesting picture of the relations between law and private force in the primitive community of Iceland is to be found in the Saga of Burnt Njal (Dasent's translation).

may punish him for having failed to perform it. Hence the distinction between civil and criminal justice. The former consists in the enforcement of rights, the latter in the punishment of wrongs. In a civil proceeding the plaintiff claims a right, and the court secures it for him by putting pressure upon the defendant to that end; as when one claims a debt that is due to him, or the restoration of property wrongfully detained from him, or damages payable to him by way of compensation for wrongful harm, or the prevention of a threatened injury by way of injunction. In a criminal proceeding, on the other hand, the prosecutor claims no right, but accuses the defendant of a wrong. He is not a claimant, but an accuser. The court makes no attempt to constrain the defendant to perform any duty, or to respect any right. It visits him instead with a penalty for the duty already disregarded and for the right already violated; as where he is hanged for murder or imprisoned for theft.

Both in civil and in criminal proceedings there is a *wrong* (actual or threatened) complained of. For the law will not enforce a right except as against a person who has already violated it, or who has at the least already shown an intention of doing so. Justice is administered only against wrongdoers, in act or in intent. Yet the complaint is of an essentially different character in civil and in criminal cases. In civil justice it amounts to a claim of right; in criminal justice it amounts merely to an accusation of wrong. Civil justice is concerned primarily with the plaintiff and his rights; criminal justice with the defendant and his offences. The former gives to the plaintiff, the latter to the defendant, that which he deserves.

A wrong regarded as the subject-matter of civil proceedings is called a civil wrong; one regarded as the subject-matter of criminal proceedings is termed a criminal wrong or a crime. The position of a person who has, by actual or threatened wrongdoing, exposed himself to legal proceedings, is termed liability or responsibility, and it is either civil or criminal according to the nature of the proceedings to which the wrongdoer is exposed.

The same act may be both a civil injury and a crime, both forms of legal remedy being available. Reason demands that in general these two remedies shall be concurrent, and not merely alternative. If possible, the law should not only compel men to perform their disregarded duties, but should by means of punishment guard against the repetition of such wrongdoing in the future. The thief should not only be compelled to restore his plunder, but should also be imprisoned for having taken it, lest he and others steal again. To this duplication of remedies, however, there are numerous exceptions. Punishment is the sole resource in cases where enforcement is from the nature of things impossible, and enforcement is the sole remedy in those cases in which it is itself a sufficient precautionary measure for the future. Not to speak of the defendant's liability for the costs of the proceedings, the civil remedy of enforcement very commonly contains, as we shall see later, a penal element which is sufficient to render unnecessary or unjustifiable any cumulative criminal responsibility.

We have defined a criminal proceeding as one designed for the punishment of a wrong done by the defendant, and a civil proceeding as one designed for the enforcement of a right vested in the plaintiff. We have now to consider a very different explanation which has been widely accepted. By many persons the distinction between crimes and civil injuries is identified with that between public and private wrongs. By a public wrong is meant an offence committed against the state or the community at large, and dealt with in a proceeding to which the state is itself a party. A private wrong is one committed against a private person, and dealt with at the suit of the individual so injured. The thief is criminally prosecuted by the Crown, but the trespasser is civilly sued by him whose right he has violated. Criminal libel, it is said, is a public wrong, and is dealt with as such at the suit of the Crown; civil libel is a private wrong, and is dealt with accordingly by way of an action for damages by the person libelled. Blackstone's statement of this view may be taken as representative: " Wrongs," he says (*g*), " are divisible into two sorts or species, private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties which affect the whole community considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanours " (*h*).

But this explanation is insufficient. In the first place, all public wrongs are not crimes. A refusal to pay taxes is an offence against the state, and is dealt with at the suit of the state, but it is a civil wrong for all that, just as a refusal to repay money lent by a private person is a civil wrong. The breach of a contract made with the state is no more a criminal offence than is the breach of a contract made with a subject. An action by the state for the recovery of a debt, or for damages, or for the restoration of public property, or for the enforcement of a public trust, is purely civil, although in each case the person injured and suing is the state itself.

Conversely, and in the second place, all crimes are not public wrongs. Most of the very numerous offences that are now punishable on summary conviction may be prosecuted at the suit of a private person; yet the proceedings are undoubtedly criminal none the less.

We must conclude, therefore, that the divisions between public and private wrongs and between crimes and civil injuries are not coincident but cross divisions. Public rights are often enforced, and private wrongs are often punished. The distinction between criminal and civil wrongs is based,

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(*g*) Commentaries, III. 2.

(*h*) Austin's theory of the distinction is somewhat different from Blackstone's, for he makes the distinction between public and private wrongs, and therefore between criminal and civil wrongs, turn not on the public or private nature of the right violated, but solely on the public or private nature of the proceeding taken in respect of its violation. " Where the wrong," he says (p. 518, 3rd ed.), " is a civil injury, the sanction is enforced at the discretion of the party whose right has been violated. Where the wrong is a crime, the sanction is enforced at the discretion of the sovereign." This theory, however, is exposed to the same objections as those which may be made to Blackstone's, and it need not be separately considered.

not on any difference in the nature of the right infringed, but on a difference in the nature of the remedy applied.

The plausibility of the theory in question is chiefly attributable to a certain peculiarity in the historical development of the administration of justice. Where the criminal remedy of punishment is left in the hands of the individuals injured, to be claimed or not as they think fit, it invariably tends to degenerate into the civil remedy of pecuniary compensation. Men barter their barren rights of vengeance for the more substantial solatium of coin of the realm. Offenders find no difficulty in buying off the vengeance of those they have offended, and a system of money payments by way of composition takes the place of a system of true punishments. Hence it is that in primitive codes true criminal law is almost unknown. Its place is taken by that portion of civil law which is concerned with pecuniary redress. Murder, theft and violence are not crimes to be punished by loss of life, limb or liberty, but civil injuries to be paid for. This is a well-recognised characteristic of the early law both of Rome and England. In the Jewish law we notice an attempt to check this process of substitution, and to maintain the law of homicide, at least, as truly criminal. "Ye shall take no satisfaction for the life of a murderer, which is guilty of death: but he shall be surely put to death" (*i*). Such attempts, however, will be for the most part vain, until the state takes upon itself the office of prosecutor, and until offences worthy of punishment cease to be matters between private persons, and become matters between the wrongdoer and the community at large. Only when the criminal has to answer for his deed to the state itself will true criminal law be successfully established and maintained. Thus at Rome the more important forms of criminal justice pertained to the sovereign assemblies of the people, while civil justice was done in the courts of the praetor and other magistrates. So in England indictable crimes are in legal theory offences against "the peace of our Lord the King, his crown and dignity," and it was only under the rule of royal justice that true criminal law

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(*i*) Numbers, xxxv. 31.

was superadded to the more primitive system of pecuniary compensation. Even at the present day, for the protection of the law of crime, it is necessary to prohibit as itself a crime the compounding of a felony, and to prevent in courts of summary jurisdiction the settlement of criminal proceedings by the parties without the leave of the court itself. Such is the historical justification of the doctrine which identifies the distinction between civil injuries and crimes with that between public and private wrongs. The considerations already adduced should be sufficient to satisfy us that the justification is inadequate.

§ 28. The Purposes of Criminal Justice: Deterrent Punishment.

The ends of criminal justice are four in number, and in respect of the purposes so served by it, punishment may be distinguished as (1) Deterrent, (2) Preventive, (3) Reformative, and (4) Retributive. Of these aspects the first is the essential and all-important one, the others being merely accessory. Punishment is before all things deterrent, and the chief end of the law of crime is to make the evildoer an example and a warning to all that are like-minded with him. Offences are committed by reason of a conflict between the interests, real or apparent, of the wrongdoer and those of society at large. Punishment prevents offences by destroying this conflict of interests to which they owe their origin—by making all deeds which are injurious to others injurious also to the doers of them—by making every offence, in the words of Locke, "an ill bargain to the offender." Men do injustice because they have no sufficient motive to seek justice, which is the good of others rather than that of the doer of it. The purpose of the criminal law is to supply by art the motives which are thus wanting in the nature of things.

§ 29. Preventive Punishment.

Punishment is, in the second place, preventive or disabling. Its primary and general purpose being to deter by fear, its secondary and special purpose is, wherever possible and expedient, to prevent a repetition of wrongdoing by the disablement of the offender. We hang murderers, not merely that we may put into the hearts of others like them the fear of a like fate, but for the same reason for which we kill snakes, namely, because it is better for us that they should be out of the world than in it. A similar secondary purpose exists in such penalties as imprisonment, exile, and forfeiture of office.

§ 30. Reformative Punishment.

Punishment is in the third place reformative. Offences are committed through the influence of motives upon character, and may be prevented either by a change of motives or by a change of character. Punishment as deterrent acts in the former method; punishment as reformative in the latter. This curative or medicinal function is practically limited to a particular species of penalty, namely, imprisonment, and even in this case pertains to the ideal rather than to the actual. It would seem, however, that this aspect of the criminal law is destined to increasing prominence. The new science of criminal anthropology would fain identify crime with disease, and would willingly deliver the criminal out of the hands of the men of law into those of the men of medicine. The feud between the two professions touching the question of insanity threatens to extend itself throughout the whole domain of crime.

It is plain that there is a necessary conflict between the deterrent and the reformative theories of punishment, and that the system of criminal justice will vary in important respects according as the former or the latter principle prevails in it. The purely reformative theory admits only such forms of punishment as are subservient to the education and discipline of the criminal, and rejects all those which are profitable only as deterrent or disabling. Death is in this view no fitting penalty; we must cure our criminals, not kill them. Flogging and other corporal inflictions are condemned as relics of barbarism by the advocates of the new doctrine; such penalties are said to be degrading and brutalising both to those who suffer and to those who inflict them, and so fail in the central purpose of criminal justice. Imprisonment, indeed, as already indicated, is the only important instrument available for the purpose of a purely reformative system. Even this, however, to be fitted for such a purpose, requires alleviation to a degree quite inadmissible in the alternative system. If criminals are sent to prison in order to be there transformed into good citizens by physical, intellectual, and moral training, prisons must be turned into dwelling-places far too comfortable to serve as any effectual deterrent to those classes from which criminals are chiefly drawn. A further illustration of the divergence between the deterrent and the reformative theories is supplied by the case of incorrigible offenders. The most sanguine advocate of the curative treatment of criminals must admit that there are in the world men who are incurably bad, men who by some vice of nature are even in their youth beyond the reach of reformative influences, and with whom crime is not so much a bad habit as an ineradicable instinct. What shall be done with these? The only logical inference from the reformative theory is that they should be abandoned in despair as no fit subjects for penal discipline. The deterrent and disabling theories, on the other hand, regard such offenders as being pre-eminently those with whom the criminal law is called upon to deal. That they may be precluded from further mischief, and at the same time serve as a warning to others, they are justly deprived of their liberty, and in extreme cases of life itself.

The application of the purely reformative theory, therefore, would lead to astonishing and inadmissible results. The perfect system of criminal justice is based on neither the reformative nor the deterrent principle exclusively, but is the result of a compromise between them. In this compromise it is the deterrent principle which possesses predominant influence, and its advocates who have the last word. This is the primary and essential end of punishment, and all others are merely secondary and accidental. The present tendency to attribute exaggerated importance to the reformative element is a reaction against the former tendency to neglect it altogether, and like most reactions it falls into the falsehood of extremes. It is an important truth, unduly neglected in times past, that to a very large extent criminals are not normal and healthy human beings, and that crime is in great measure the product of physical and mental abnormality and degeneracy. It has been too much the practice to deal with offenders on the assumption that they are ordinary types of humanity. Too much attention has been paid to the crime, and too little to the criminal. Yet we must be careful not to fall into the opposite extreme. If crime has become the monopoly of the abnormal and the degenerate or even the mentally unsound, the fact must be ascribed to the selective influence of a system of criminal justice based on a sterner principle than that of reformation. The more efficient the coercive action of the state becomes, the more successful it is in restraining all normal human beings from the dangerous paths of crime, and the higher becomes the proportion of degeneracy among those who break the law. Even with our present imperfect methods the proportion of insane persons among murderers is very high; but if the state could succeed in making it impossible to commit murder in a sound mind without being indubitably hanged for it afterwards, murder would soon become, with scarcely an exception, limited to the insane.

If, after this consummation had been reached, the opinion were advanced that inasmuch as all murderers are insane, murder is not a crime which needs to be suppressed by the strong arm of the penal law, and pertains to the sphere of medicine rather than to that of jurisprudence, the fallacy of the argument would be obvious. Were the state to act on any such principle, the proposition that all murderers are insane would very rapidly cease to be true. The same fallacy, though in a less obvious form, is present in the more general argument that, since the proportion of disease and degeneracy among criminals is so great, the reformative function of punishment should prevail over, and in a great measure exclude, its deterrent and coercive functions. For it is chiefly through the permanent influence and operation of these latter functions, partly direct in producing a fear of evildoing, partly indirect in establishing and maintaining those moral habits and sentiments which are possible only under the shelter of coercive law, that crime has become limited, in such measure as it has, to the degenerate, the abnormal, and the insane. Given an efficient penal system, crime is too poor a bargain to commend itself, save in exceptional circumstances, to any except those who lack the self-control, the intelligence, the prudence, or the moral sentiments of the normal man. But apart from criminal law in its sterner aspects, and apart from that positive morality which is largely the product of it, crime is a profitable industry, which will flourish exceedingly, and be by no means left as a monopoly to the feebler and less efficient members of society.

Although the general substitution of the reformative for the deterrent principle would lead to disaster, it may be argued that the substitution is possible and desirable in the special case of the abnormal and degenerate. Purely reformative treatment is now limited to the insane and the very young; should it not be extended to include all those who fall into crime through their failure to attain to the standard of normal humanity? No such scheme, however, seems practicable. In the first place, it is not possible to draw any sharp line of distinction between the normal and the degenerate human being. It is difficult enough in the only case of degeneracy now recognised by the law, namely, insanity; but the difficulty would be a thousand-fold increased had we to take account of every lapse from the average type. The law is necessarily a rough and ready instrument, and men must be content in general to be judged and dealt with by it on the basis of their common humanity, and not on that of their special idiosyncrasies. In the second place, even in the case of those who are distinctly abnormal, it does not appear, except in the special instance of mental unsoundness, that the purely deterrent influences of punishment are not effective and urgently required. If a man is destitute of the affections and social instincts of humanity, the judgment of common sense upon him is not that he should be treated more leniently than the normal evildoer—not that society should cherish him in the hope of making him a good citizen—but that by the rigour of penal discipline his fate should be made a terror and a warning to himself and others. And in this matter sound science approves the judgment of common sense. Even in the case of the abnormal it is easier and more profitable to prevent crime by the fear of punishment than to procure by reformative treatment the repentance and amendment of the criminal.

It is needful, then, in view of modern theories and tendencies, to insist on the primary importance of the deterrent element in criminal justice. The reformative element must not be overlooked, but neither must it be allowed to assume undue prominence. To what extent it may be permitted in particular instances to overrule the requirements of a strictly deterrent theory is a question of time, place, and circumstance. In the case of youthful criminals the chances of effective reformation are greater than in that of adults, and the rightful importance of the reformative principle is therefore greater also. In orderly and law-abiding communities concessions may be safely made in the interests of reformation, which in more turbulent societies would be fatal to the public welfare.

§ 31. Retributive Punishment.

We have considered criminal justice in three of its aspects —namely, as deterrent, disabling, and reformative—and we have now to deal with it under its fourth and last aspect as retributive. Retributive punishment, in the only sense in which it is admissible in any rational system of administering justice, is that which serves for the satisfaction of that emotion of retributive indignation which in all healthy communities is stirred up by injustice. It gratifies the instinct of revenge or retaliation, which exists, not merely in the individual wronged, but also by way of sympathetic extension in the society at large. Although the system of private revenge has been suppressed, the emotions and instincts that lay at the root of it are still extant in human nature, and it is a distinct though subordinate function of criminal justice to afford them their legitimate satisfaction. For although in their lawless and unregulated exercise and expression they are full of evil, there is in them none the less an element of good. The emotion of retributive indignation, both in its self-regarding and its sympathetic forms, is even yet the mainspring of the criminal law. It is to the fact that the punishment of the wrongdoer is at the same time the vengeance of the wronged, that the administration of justice owes a great part of its strength and effectiveness. Did we punish criminals merely from an intellectual appreciation of the expediency of so doing, and not because their crimes arouse in us the emotion of anger and the instinct of retribution, the criminal law would be but a feeble instrument. Indignation against injustice is, moreover, one of the chief constituents of the moral sense of the community, and positive morality is no less dependent on it than is the law itself. It is good, therefore, that such instincts and emotions should be encouraged and strengthened by their satisfaction; and in civilised societies this satisfaction is possible in any adequate degree only through the criminal justice of the state. There can be little question that at the present day the sentiment of retributive indignation is deficient rather than excessive, and requires stimulation rather than restraint. Unquestionable as have been the benefits of that growth of altruistic sentiment which characterises modern society, it cannot be denied that in some respects it has taken a perverted course and has interfered unduly with the sterner virtues. We have too much forgotten that the mental attitude which best becomes us, when fitting justice is done upon the evildoer, is not pity, but solemn exultation (*k*).

The foregoing explanation of retributive punishment as essentially an instrument of vindictive satisfaction is by no means that which receives universal acceptance. It is a very widely held opinion that retribution is in itself, apart altogether from any deterrent or reformative influences exercised by it, a right and reasonable thing, and the just reward of iniquity.

(*k*) Diogenes Laertius tells us that when Solon was asked how men might most effectually be restrained from committing injustice, he answered : " If those who are not injured feel as much indignation as those who are."

According to this view, it is right and proper, without regard to ulterior consequences, that evil should be returned for evil, and that as a man deals with others so should he himself be dealt with. An eye for an eye and a tooth for a tooth is deemed a plain and self-sufficient rule of natural justice. Punishment as so regarded is no longer a mere instrument for the attainment of the public welfare, but has become an end in itself. The purpose of vindictive satisfaction has been eliminated without any substitute having been provided. Those who accept this view commonly advance retribution to the first place among the various aspects of punishment, the others being relegated to subordinate positions.

This conception of retributive justice still retains a prominent place in popular thought. It flourishes also in the writings of theologians and of those imbued with theological modes of thought, and even among the philosophers it does not lack advocates. Kant, for example, expresses the opinion that punishment cannot rightly be inflicted for the sake of any benefit to be derived from it either by the criminal himself or by society, and that the sole and sufficient reason and justification of it lies in the fact that evil has been done by him who suffers it (*l*). Consistently with this view, he derives the measure of punishment, not from any elaborate considerations as to the amount needed for the repression of crime, but from the simple principle of the *lex talionis*: "Thine eye shall not pity; but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot" (*m*). No such principle, indeed, is capable of literal interpretation; but subject to metaphorical and symbolical applications it is in Kant's view the guiding rule of the ideal scheme of criminal justice.

It is scarcely needful to observe that, from the utilitarian point of view hitherto taken up by us, such a conception of

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(*l*) Kant's Rechtslehre (Hastie's trans. p. 195). The like opinion is expressed in Woolsey's Political Science, I. p. 334: "The theory that in punishing an evildoer the state renders to him his deserts, is the only one that seems to have a solid foundation. . . . It is fit and right that evil, physical or mental, suffering or shame, should be incurred by the wrongdoer." See also Fry, Studies by the Way (The Theory of Punishment), pp. 43-71.

(*m*) Deuteronomy, xix. 21.

retributive punishment is totally inadmissible. Punishment is in itself an evil, and can be justified only as the means of attaining a greater good. Retribution is in itself not a remedy for the mischief of the offence, but an aggravation of it. The opposite opinion may be regarded as a product of the incomplete transmutation of the conception of revenge into that of punishment. It results from a failure to appreciate the rational basis of the instinct of retribution—a failure to refer the emotion of retributive indignation to the true source of its rational justification—so that retaliation is deemed an end in itself, and is regarded as the essential element in the conception of penal justice.

A more definite form of the idea of purely retributive punishment is that of expiation. In this view, crime is done away with, cancelled, blotted out, or expiated, by the suffering of its appointed penalty. To suffer punishment is to pay a debt due to the law that has been violated. Guilt *plus* punishment is equal to innocence. "The wrong," it has been said (*n*), "whereby he has transgressed the law of right, has incurred a debt. Justice requires that the debt be paid, that the wrong be expiated. . . . This is the first object of punishment—to make satisfaction to outraged law." This conception, like the preceding, marks a stage in the transformation of revenge into criminal justice. Until this transformation is complete, the remedy of punishment is more or less assimilated to that of redress. Revenge is the right of the injured person. The penalty of wrongdoing is a debt which the offender owes to his victim, and when the punishment has been endured the debt is paid, the liability is extinguished, innocence is substituted for guilt, and the *vinculum juris* forged by crime is dissolved. The object of true redress is to restore the position demanded by the rule of right, to substitute justice for injustice, to compel the wrongdoer to restore to the injured person that which is his own. A like purpose is assigned to punishment, so long as it is imperfectly differentiated from that retributive vengeance which is in some sort a reparation for wrongdoing. The fact that in the

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(*n*) Lilley, Right and Wrong, p. 128.

expiatory theory satisfaction is conceived as due rather to the outraged majesty of the law, than to the victim of the offence, merely marks a further stage in the refinement and purification of the primitive conception.

§ 32. Civil Justice; Primary and Sanctioning Rights.

We proceed now to the consideration of civil justice and to the analysis of the various forms assumed by it. It consists, as we have seen, in the enforcement of rights, as opposed to the punishment of wrongs. The first distinction to be noticed is that the right so enforced is either a Primary or a Sanctioning right. A sanctioning right is one which arises out of the violation of another right. All others are primary; they are rights which have some other source than wrongs. Thus my right not to be libelled or assaulted is primary; but my right to obtain pecuniary compensation from one who has libelled or assaulted me is sanctioning. My right to the fulfilment of a contract made with me is primary; but my right to damages for its breach is sanctioning.

The administration of civil justice, therefore, falls into two parts, according as the right enforced belongs to the one or the other of these two classes. Sometimes it is impossible for the law to enforce the primary right; sometimes it is possible but not expedient. If by negligence I destroy another man's property, his right to this property is necessarily extinct and no longer enforceable. The law, therefore, gives him in substitution for it a new and sanctioning right to receive from me the pecuniary value of the property that he has lost. If on the other hand I break a promise of marriage, it is still possible, but it is certainly not expedient, that the law should specifically enforce the right, and compel me to enter into that marriage; and it enforces instead a sanctioning right of pecuniary satisfaction. A sanctioning right almost invariably consists of a claim to receive money from the wrongdoer, and we shall here disregard any other forms, as being quite exceptional.

The enforcement of a primary right may be conveniently termed specific enforcement. For the enforcement of a sanctioning right there is no very suitable generic term, but we may venture to call it sanctional enforcement.

Examples of specific enforcement are proceedings whereby a defendant is compelled to pay a debt, to perform a contract, to restore land or chattels wrongfully taken or detained, to refrain from committing or continuing a trespass or nuisance, or to repay money received by mistake or obtained by fraud. In all these cases the right enforced is the primary right itself, not a substituted sanctioning right. What the law does is to insist on the specific establishment or re-establishment of the actual state of things required by the rule of right, not of another state of things which may be regarded as its equivalent or substitute.

Sanctioning rights may be divided into two kinds by reference to the purpose of the law in creating them. This purpose is either (1) the imposition of a pecuniary penalty upon the defendant for the wrong which he has committed, or (2) the provision of pecuniary compensation for the plaintiff in respect of the damage which he has suffered from the defendant's wrongdoing. Sanctioning rights, therefore, are either (1) rights to exact and receive a pecuniary penalty, or (2) rights to exact and receive damages or other pecuniary compensation.

The first of these kinds is rare in modern English law, though it was at one time of considerable importance both in our own and in other legal systems. But it is sometimes the case even yet, that the law creates and enforces a sanctioning right which has in it no element of compensation to the person injured, but is appointed solely as a punishment for the wrongdoer. For example, a statute may make provision for a pecuniary penalty payable to a common informer, that is to say, to anyone who shall first sue the offender for it. Such an action is called a penal action, as being brought for the recovery of a penalty. But it is none the less a purely civil, and in no respect a criminal proceeding. Primarily and immediately, it is an action for the enforcement of a right, not for the punishment of a wrong. It pertains, therefore, to the civil administration of justice, no less than an ordinary action for the recovery of a debt. The mere fact that the sanctioning right thus enforced is created by the law for the purpose of punishment does not bring the action within the sphere of criminal justice. In order that a proceeding should be criminal it is necessary that its direct and immediate purpose should be punishment; it is not enough that its purpose should be the enforcement of a right which has been created by way of punishment. A proceeding is civil if it is one for the enforcement of a right, and the source, nature, and purpose of the right so enforced are irrelevant (*o*).

The second form of sanctioning right—the right to pecuniary compensation or damages—is in modern law by far the more important. It may be stated as a general rule, that the violation of a private right gives rise, in him whose right it is, to a sanctioning right to receive compensation for the injury so done to him. Such compensation must itself be divided into two kinds, which may be distinguished as Restitution and Penal Redress. In respect of the person injured, indeed, these two are the same in their nature and operation; but in respect of the wrongdoer they are very different. In restitution the defendant is compelled to give up the pecuniary value of some benefit which he has wrongfully obtained at the expense of the plaintiff; as when he who has wrongfully taken or detained another's goods is made to pay him the pecuniary value of them, or when he who has wrongfully enriched himself at another's expense is compelled to account to him for all money so obtained.

Penal redress, on the other hand, is a much more common and important form of legal remedy than mere restitution. The law is seldom content to deal with a wrongdoer by merely compelling him to restore all benefits which he has derived from his wrong; it commonly goes further, and compels him

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(*o*) It is worth notice that an action may be purely penal even though the penalty is payable to the person injured. It is enough in such a case that the receipt of the penalty should not be reckoned as or towards the compensation of the recipient. A good example of this is the Roman *actio furti* by which the owner of stolen goods could recover twice their value from the thief by way of penalty, without prejudice nevertheless to a further action for the recovery of the goods themselves or their value.

to pay the amount of the plaintiff's loss; and this may far exceed the profit, if any, which he has himself received. It is clear that compensation of this kind has a double aspect and nature; from the point of view of the plaintiff it is compensation and nothing more, but from that of the defendant it is a penalty imposed upon him for his wrongdoing. The compensation of the plaintiff is in such cases the instrument which the law uses for the punishment of the defendant, and because of this double aspect we call it penal redress. Thus if I burn down my neighbour's house by negligence, I must pay him the value of it. The wrong is then undone with respect to him, indeed, for he is put in as good a position as if it had not been committed. Formerly he had a house, and now he has the worth of it. But the wrong is not undone with respect to me, for I am the poorer by the value of the house, and to this extent I have been punished for my negligence.

§ 33. A Table of Legal Remedies.

The result of the foregoing analysis of the various forms assumed by the administration of justice, civil and criminal, may be exhibited in a tabular form as follows:—

- Legal Proceedings
  - CIVIL—Enforcement of rights
    - SPECIFIC ENFORCEMENT—enforcement of a primary right: *e.g.*, payment of debt, or return of property detained.
    - SANCTIONAL ENFORCEMENT—enforcement of a sanctioning right
      - COMPENSATION
        - RESTITUTION—return of profit unlawfully made.
        - PENAL REDRESS—payment for loss unlawfully inflicted.
      - PENALTY: *e.g.*, action by informer for statutory penalty.
  - CRIMINAL—Punishment of wrongs: *e.g.*, imprisonment for theft.

§ 34. Penal and Remedial Proceedings.

It will be noticed that in the foregoing table legal proceedings have been divided into five distinct classes, namely, (1) actions for specific enforcement, (2) actions for restitution, (3) actions for penal redress, (4) penal actions, and (5) criminal prosecutions. It must now be observed that the last three of these contain a common element which is absent from the others, namely, the idea of punishment. In all these three forms of procedure the ultimate purpose of the law is in whole or in part the punishment of the defendant. This is equally so, whether he is imprisoned, or compelled to pay a pecuniary penalty to a common informer, or is held liable in damages to the person injured by him. All these proceedings, therefore may be classed together as *penal*, and as establishing *penal liability*. The other forms, namely, specific enforcement and restitution, contain no such penal element; the idea of punishment is entirely foreign to them; and they may be classed together as *remedial*, and as establishing remedial liability. From the point of view of legal theory this distinction between penal and remedial liability is, as we shall see, of even greater importance than that between criminal and civil liability. It will be noted that all criminal proceedings are at the same time penal, but that the converse is not true, some civil proceedings being penal while others are merely remedial.

It may be objected that this explanation fails to distinguish between penal liability and criminal, inasmuch as punishment is stated to be the essential element in each. The answer to this objection is that we must distinguish between the ulterior and the immediate purposes of the law. Proceedings are classed as criminal or civil in respect of their immediate aim; they are distinguished as penal or remedial in respect of their entire purpose, remote as well as immediate. One way of punishing a wrongdoer is to impose some new obligation upon him, and to enforce the fulfilment of it. He may be compelled to pay a penalty or damages. Whenever this course is adopted, the immediate design of the law is the enforcement of the right to the penalty or damages, but its ulterior design is the punishment of the wrong out of which this right arose. In respect of the former the proceedings are civil, not criminal; while in respect of the latter they are penal, not remedial. Penal proceedings, therefore, may be defined as those in which the object of the law, immediate or ulterior, is or includes the punishment of the defendant. All others are remedial, the purpose of the law being nothing more than the enforcement of the plaintiff's right, and the idea of punishment being irrelevant and inapplicable.

§ 35. Secondary Functions of Courts of Law.

Hitherto we have confined our attention to the administration of justice in the narrowest and most proper sense of the term. In this sense it means, as we have seen, the application by the state of the sanction of physical force to the rules of justice. It is the forcible defence of rights and suppression of wrongs. The administration of justice properly so called, therefore, involves in every case two parties, the plaintiff and the defendant, a right claimed or a wrong complained of by the former as against the latter, a judgment in favour of the one or the other, and execution of this judgment by the power of the state if need be. We have now to notice that the administration of justice in a wider sense includes all the functions of courts of justice, whether they conform to the foregoing type or not. It is to administer justice in the strict sense that the tribunals of the state are established, and it is by reference to this essential purpose that they must be defined. But when once established, they are found to be useful instruments, by virtue of their constitution, procedure, authority, or special knowledge, for the fulfilment of other more or less analogous functions. To these secondary and non-essential activities of the courts, no less than to their primary and essential functions, the term administration of justice has been extended. They are miscellaneous and indeterminate in character and number, and tend to increase with the advancing complexity of modern civilisation. They fall chiefly into four groups:

(1) *Petitions of right.* The courts of law exercise, in the

first place, the function of adjudicating upon claims made by subjects against the state itself. If a subject claims that a debt is due to him from the Crown, or that the Crown has broken a contract with him, or wrongfully detains his property, he may be permitted to take proceedings by way of petition of right in a court of law for the determination of his rights in the matter. The petition is addressed to the Crown itself, but is referred for consideration to the courts of justice, and these courts will investigate the claim in due form of law, and pronounce in favour of the petitioner or of the Crown, just as in an action between two private persons. But this is not the administration of justice properly so called, for the essential element of coercive force is lacking. The state is the judge in its own cause, and cannot exercise constraint against itself. Nevertheless in the wider sense the administration of justice includes the proceedings in a petition of right, no less than a criminal prosecution or an action for debt or damages against a private individual.

(2) *Declarations of right.* The second form of judicial action which does not conform to the essential type is that which results, not in any kind of coercive judgment, but merely in a declaration of right. A litigant may claim the assistance of a court of law, not because his rights have been violated, but because they are uncertain. What he desires may be not any remedy against an adversary for the violation of a right, but an authoritative declaration that the right exists. Such a declaration may be the ground of subsequent proceedings in which the right, having been violated, receives enforcement, but in the meantime there is no enforcement nor any claim to it. Examples of declaratory proceedings are declarations of legitimacy, declarations of nullity of marriage, advice to trustees or executors as to their legal powers and duties, and the authoritative interpretation of wills.

(3) *Administrations.* A third form of secondary judicial action includes all those cases in which courts of justice undertake the management and distribution of property. Examples are the administration of a trust, the liquidation of a company

by the court, and the realisation and distribution of an insolvent estate.

(4) *Titles of right.* The fourth and last form includes all those cases in which judicial decrees are employed as the means of creating, transferring, or extinguishing rights. Instances are a decree of divorce or judicial separation, an adjudication of bankruptcy, an order of discharge in bankruptcy, a decree of foreclosure against a mortgagor, an order appointing or removing trustees, a grant of letters of administration, and vesting or charging orders. In all these cases the judgment or decree operates, not as the remedy of a wrong, but as the title of a right.

These secondary forms of judicial action are to be classed under the head of the *civil* administration of justice. Here, as in its other uses, the term civil is merely residuary; civil justice is all that is not criminal.

We have defined the law as consisting of the rules observed in the administration of justice. We have now seen that the latter term is used in a double sense, and the question therefore arises whether it is the strict or the wide sense that is to be adopted in our definition of the law. There can be no doubt, however, that logic admits, and convenience requires, the adoption of the wider application. We must recognise as law the sum total of the rules that are applied by courts of justice in the exercise of any of their functions, whether these are primary and essential or secondary and accidental. The principles in accordance with which the courts determine a petition of right, decree a divorce, or grant letters of administration, are as truly legal principles as those which govern an action of debt or a suit for specific performance.

SUMMARY.

The administration of justice by the state a permanent necessity.
The origin of the administration of justice.
Justice { Criminal—The punishment of wrongs.
Justice { Civil—The enforcement of rights.
Crimes not necessarily public wrongs.
Purposes of punishment:—

1. Deterrent.
2. Preventive.
3. Reformative.
4. Retributive.

- Civil Justice
  - Enforcement of primary rights—Specific enforcement.
  - Enforcement of sanctioning rights—Sanctional enforcement.
- Sanctional enforcement
  - Compensation
    - Restitution.
    - Penal redress.
  - Penalty
- Justice
  - Remedial—independent of the idea of punishment—always civil.
  - Penal—involving the idea of punishment—civil or criminal.

Subsidiary functions of courts of justice:—

1. Petitions of right.
2. Declarations of right.
3. Administration of property.
4. Creation, transfer, and extinction of rights.

CHAPTER V.

THE STATE.

§ 36. The Nature and Essential Functions of the State.

A complete analysis of the nature of law involves an inquiry into the nature of the state, for it is in and through the state alone that law exists. Jurisprudence is concerned, however, only with the elements and first principles of this matter. An exhaustive theory of political government pertains, not to jurisprudence, but to the allied science of politics. From the lawyer nothing more is required than the adoption of some such doctrine on the essential nature of the state, as will furnish the necessary background for a sound juridical theory.

A state, then, or political society, may be conceived of as an association of human beings established for the attainment of certain ends by certain means. It is the most important of all the various kinds of society in which men unite, being indeed the necessary basis and condition of peace, order, and civilisation. What then is the essential difference between this and other forms of association? In what does the state essentially differ from such other societies as a church, a university, a joint-stock company, or a trade union? The difference is clearly one of *function*. The state must be defined by reference to such of its activities and purposes as are essential and characteristic.

But the modern state does many things, and different things at different times and places. It is a common carrier of letters and parcels, it builds ships, it owns and manages railways, it conducts savings banks, it teaches children, and feeds the poor. All these cannot be of its essence. It is possible, however, to distinguish among the multitudinous operations of government, two which it is suggested may be set apart as primary and essential. These two are *war* and the *administration of justice*. The fundamental purpose and end of political society is defence against external enemies, and the maintenance of peaceable and orderly relations within the community itself. It would be easy to show, by a long succession of authorities, that these two have always been recognised as the essential duties of governments. The Israelites demanded a king, that he "may judge us, and go out before us, and fight our battles" (*a*); and this conception of the primary end and aim of sovereignty obtains recognition still as true and adequate. Leviathan, as Hobbes (*b*) tells us, carries two swords, the sword of war and that of justice. This is the irreducible minimum of governmental action. Every society which performs these two functions is a political society or state, and none is such which does not perform them. How much activity in other directions may be profitably combined with them is a question with which we are not here concerned. We are dealing with the definition, and therefore with the essence, not with the accidents of political society (*c*).

It is not difficult to show that the waging of war and the administration of justice, however diverse in appearance, are merely two different species of a single genus. The essential purpose of each is the same, though the methods are different. Each consists in the exercise of the organised physical force of the community, and in each case this force is made use of to the same end, namely, the maintenance of the just rights of the community and its members. We have already seen that in administering justice the state uses its physical power to enforce rights and to suppress and punish wrongs. Its purpose

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(*a*) I. Samuel, viii. 20.

(*b*) English Works, II. 76: "Both swords, therefore, as well this of war as that of justice, . . . essentially do belong to the chief command."

(*c*) "The primary function of the state," says Herbert Spencer (Principles of Ethics II. 204. 208. 214) "or of that agency in which the powers of the state are centralised, is the function of directing the combined actions of the incorporated individuals in war. The first duty of the ruling agency is national defence. What we may consider as measures to maintain inter-tribal justice, are more imperative and come earlier, than measures to maintain justice among individuals. . . . Once established, this secondary function of the state goes on developing; and becomes a function next in importance to the function of protecting against external enemies. . . . With the progress of civilisation the administration of justice continues to extend and to become more efficient. . . . Between these essential functions and all other functions there is a division, which, though it cannot in all cases be drawn with precision, is yet broadly marked."

in waging war—that is to say, war conceived of as *just*, which is the only kind which can be regarded as an essential form of state activity—is the same. These two primary functions are simply the two different ways in which a political society uses its power in the defence of itself and its members against external and internal enemies. They are the two methods in which a state fulfils its appointed purpose of establishing right and justice by physical force.

What, then, is the essential difference between these two functions? It lies apparently in this, that the administration of justice is the *judicial*, while war is the *extrajudicial* use of the force of the state in the maintenance of right. Force is judicial when it is applied by or through a tribunal, whose business it is to judge or arbitrate between the parties who are at issue. It is extrajudicial when it is applied by the state directly, without the aid or intervention of any such judge or arbitrator. Judicial force involves trial and adjudication, as a condition precedent to its application; extrajudicial force does not. Judicial force does not move to the maintenance of rights or the suppression of wrongs, until these rights and wrongs have been authoritatively declared and ascertained by the formal judgment of a court. The primary purpose of judicial force is to *execute judgment* against those who will not voluntarily yield obedience to it. Only indirectly, and through such judgment, does it enforce rights and punish wrongs. But extrajudicial force strikes directly at the offender. It recognises no trial or adjudication as a condition of its exercise. It requires no authoritative judicial declaration of the rights protected or of the wrongs punished by it. When a rebellion or a riot is suppressed by troops, this is the extrajudicial use of force; but when, after its suppression, the rebels or rioters are tried, sentenced, and punished by the criminal courts, the force so used is judicial. To shoot a man on the field of battle or at a barricade is war; to shoot him after capture and condemnation by a court martial is the administration of justice (*d*).

(*d*) It is to be noted that the term war is commonly applied only to the more extreme forms of extrajudicial force. Rioting would not be termed

In addition to the essential difference which we have just noticed, there are several minor and unessential differences, which are commonly, though not invariably, present. The chief of these are the following:

1. Judicial force is regulated by law, while the force of arms is usually exempt from such control. Justice is according to law; war is according to the good pleasure of those by whom it is carried on. *Inter arma leges silent* is a maxim which is substantially, though not wholly, true. The civil law has little to say as to the exercise by the state of its military functions. As between the state and its external enemies, it is absolutely silent; and even as to the use of extrajudicial force within the body politic itself, as in the suppression of riots, insurrections, or forcible crimes, the law of England, for example, lays down no principle save this, that such force is allowable when, and only when, it is necessary. *Necessitas non habet legem.* Within the community the law insists that all force shall be judicial if possible. This protection against extrajudicial force—this freedom from all constraint save that which operates through the courts of law and justice—is one of the chief privileges of the members of the body politic. We accept it now as a matter of course, but in older and more turbulent days it was recognised as a benefit to be striven for and maintained with anxious vigilance (*e*).

2. In the second place, judicial force is commonly exercised against private persons, extrajudicial force against states. It is clear, however, that this is not necessarily or invariably the case. It is not impossible that one state should administer

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civil war, although the difference between them is merely one of degree. Nor would the punitive expedition of an armed cruiser against a village in the South Sea Islands be dignified with the name of war, though it differs only in degree from the blockade or bombardment of the ports of a civilised state. To be perfectly accurate, therefore, we should oppose the administration of justice not to war, but to the extrajudicial use of force counting war as the most important species of the latter. War, however, so greatly overshadows in importance all other forms of such force, that it is more convenient to take it as representing the genus, and to disregard the others.

(*e*) The prohibition of the use of extrajudicial force by the King against his subjects is one of the main provisions of Magna Carta (sect. 39): "No free man shall be taken or imprisoned or disseized or outlawed or exiled or anyways destroyed, nor will we go against him, nor will we send against him, save by the lawful judgment of his peers, or by the law of the land."

justice between two others, or between another state and itself. And, on the other hand, it may wage war with its own subjects, or with pirates or other persons who do not constitute a political society.

3. Thirdly, the administration of justice is generally the internal, while war is generally the external exercise of the power of the state. In other words, the state commonly proceeds against internal enemies by way of judicial, and against external enemies by way of extrajudicial force. The administration of justice is the right and privilege of the members of the body politic itself. Those who stand outside the community—whether they are individuals or states—have no claim to the impartial arbitrament of judicial tribunals, and may be struck at directly by the armed and heavy hand of the state. Yet this also is merely a general, and not an invariable rule.

4. Fourthly and lastly, in the administration of justice the element of force is commonly latent or dormant, whereas in war it is seen in actual exercise. Those persons against whom the state administers justice are commonly so completely within its power, that they have no choice save voluntary submission and obedience. It is enough that the state possesses irresistible force and threatens to use it; its actual use is seldom called for. In war, on the other hand, there is commonly no such overwhelming disparity of power, and a state which in this fashion seeks to impose its will on others must usually go beyond threats to their actual execution. Hence it is, that in the administration of justice the element of trial and adjudication is in appearance far more predominant and important than that of force. Viewed externally and superficially, this function of the state looks like the elimination of force as a method of the settlement of controversies, and the substitution of peaceful arbitration. But it is not so. Force is the essence of the administration of justice, no less than of war; but for the most part it lies latent and concealed. The establishment of courts of justice marks, not the substitution of arbitration for force, but the substitution of one kind of force for another—of public force

for private, of judicial force for extrajudicial, of latent and threatened force for that which is actually exercised. As states increase in power, this difference between their two essential functions is intensified. In feeble, turbulent, and ill-governed states the element of force in the administration of justice tends to come to the surface. The will of the state no longer receives implicit obedience from those that are subject to its jurisdiction. It may be necessary to execute the judgments of the courts by military force, and there may be little difference of external aspect between the use of judicial force in the execution of a judgment, and the use of extrajudicial force in the suppression of riot, rebellion, or civil war (*f*).

§ 37. Secondary Functions of the State.

The secondary functions of the state may be divided into two classes. The first consists of those which serve to secure the efficient fulfilment of the primary functions, and the chief of these are two in number, namely, legislation and taxation. Legislation is the formulation of the principles in accordance with which the state intends to fulfil its functions of administering justice. Taxation is the instrument by which the state obtains that revenue which is the essential condition of all its activities. The remaining class of secondary functions comprises all other forms of activity which are for any reason deemed specially fit to be undertaken by the state. This special fitness may proceed from various sources. It is derived partly from the fact that the state represents the whole population of an extensive territory; partly from the fact that it possesses, through the organised physical force at its command, powers of coercion which are non-existent elsewhere; and partly from the fact that its financial resources (due to the exercise of its coercive powers by way of taxation) are immensely beyond those of all other persons and societies.

(*f*) On the original identity and gradual differentiation of the two functions of the state, see Spencer's Sociology, II. pp. 493 *sqq*. "The sword of justice," he says at p. 494, "is a phrase sufficiently indicating the truth that action against the public enemy and action against the private enemy are in the last resort the same."

Considerations such as these have, especially in modern times, induced the state to assume a great number of secondary and unessential functions which, in a peaceful and law-abiding community, tend even to overshadow and conceal from view those primary functions in which the essential nature of the state is to be found.

§ 38. The Territory of the State.

By the territory of a state is to be understood that portion of the earth's surface which is in its exclusive possession and control. It is that region throughout which the state is thought of as making its will permanently supreme, and from which, in principle, it permanently excludes all alien interference (*g*). For the substantially exclusive possession of a defined territory is a characteristic feature of all civilised and normal states. It is found to be a necessary condition of the efficient exercise of governmental functions. But we cannot say that it is essential to the existence of a state. A state without a fixed territory—a nomadic tribe for example—is perfectly possible. A non-territorial society may be organised for the fulfilment of the essential functions of government, and if so, it will be a true state. Such a position of things is, however, so rare and unimportant that it is permissible to disregard it as abnormal. It is with the territorial state that we are alone concerned, and with reference to it we may accordingly define a state as *a society of men established for the maintenance of peace and justice within a determined territory by way of force.*

§ 39. The Membership of the State.

Who, then, are the members of this society, and by what title do men obtain entrance into it? In all civilised communities the title of state-membership is twofold, and the members of the body politic are of two classes accordingly. These two titles are citizenship and residence. The former is a personal, the latter merely a territorial bond between the

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(*g*) The legal conception of state territory is more fully considered in Appendix V.

state and the individual. The former is a title of permanent, the latter one of temporary membership of the political community. The state, therefore, consists, in the first place, of all those who by virtue of this personal and permanent relationship are its citizens or subjects, and, in the second place, of all those who for the time being reside within its territory, and so possess a temporary and territorial title to state-membership. Both classes are equally members of the body politic, so long as their title lasts; for both have claims to the protection of the laws and government of the state, and to such laws and government both alike owe obedience and fidelity. They are alike subject to the dominion of the state, and it is in the interests of both that the state exists and fulfils its functions.

These two titles of state-membership are to a great extent united in the same persons. Most British subjects inhabit British territory, and most inhabitants of that territory are British subjects. Yet the coincidence is far from complete, for many men belong to the state by one title only. They are British subjects, but not resident within the dominions of the Crown; or they are resident within those dominions, but are not British subjects. In other words, they are either non-resident subjects or resident aliens. Non-resident aliens, on the other hand, possess no title of membership, and stand altogether outside the body politic. They are not within the power and jurisdiction of the state; they owe no obedience to the laws, nor fidelity to the government; it is not for them or in their interests that the state exists (*h*).

(*h*) Speaking generally, we may say that the terms subject and citizen are synonymous. Subjects and citizens are alike those whose relation to the state is personal and not merely territorial, permanent and not merely temporary. This equivalence, however, is not absolute. For in the first place, the term subject is commonly limited to monarchical forms of government, while the term citizen is more specially applicable in the case of republics. A British subject becomes by naturalisation a citizen of the United States of America or of France. In the second place, the term citizen brings into prominence the rights and privileges of the status, rather than its correlative obligations, while the reverse is the case with the term subject. Finally it is to be noticed that the term subject is capable of a different and wider application, in which it includes all members of the body politic, whether they are citizens (*i.e.*, subjects *stricto sensu*) or resident aliens. All such persons are subjects, as being subject to the power of the state and to its jurisdiction, and as

The practical importance of the distinction between the two forms of state-membership lies chiefly in the superior privileges possessed by citizens or subjects. Citizenship is a title to rights which are not available for aliens. Citizens are members *optimo jure*, while aliens stand on a lower level in the scale of legal right. Thus British subjects alone possess political as opposed to merely civil rights (*i*); until a few years ago they alone were capable of inheriting or holding land in England; to this day they alone can own a British ship or any share in one; they alone are entitled when abroad to the protection of their government against other states, or to the protection of English courts of law against illegal acts of the English executive; they alone can enter British territory as of right; they alone are entitled to the benefit of certain statutes from the operation of which aliens are expressly or by implication excluded. It is true, indeed, that we must set off against these special privileges certain corresponding burdens and liabilities. Subjects alone remain within the power and jurisdiction of the Crown, even when they are outside its dominions. Wheresoever they are, they owe fidelity and obedience to the laws and government of their own state, while an alien may release himself at will from all such ties of subjection. Nevertheless the status of a subject is a privilege and not a disability, a benefit and not a burden. Citizenship is the superior, residence the inferior, title of state-membership.

Viewing the matter historically, we may say that citizenship is a legal conception, the importance of which is con-

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owing to it, at least temporarily, fidelity and obedience. Thus it has been said that: "Every alien coming into a British colony becomes temporarily a subject of the Crown—bound by, subject to, and entitled to the benefit of the laws which affect all British subjects." *Low* v. *Routledge*, 1 Ch. App. at p. 47. See also *Jeffreys* v. *Boosey*, 4 H. L. C. 815. So in Hale's Pleas of the Crown, I. 542, it is said: "Though the statute speaks of the king's subjects, it extends to aliens, . . . for though they are not the king's natural born subjects, they are the king's subjects when in England by a local allegiance."

(*i*) The possession of political rights is so characteristic and important a feature of citizenship, that some may be tempted to regard it as the essence of the matter. This, however, is not so. Women had no political rights, yet a wife was as much a British subject as her husband. The distinction between subject and alien may exist under a despotic government, neither class possessing any political rights at all.

tinuously diminishing. The consistent tendency of legal development is to minimise the peculiar rights and liabilities of subjects, and to make residence rather than citizenship the essential and sufficient title of state-membership The acquisition and loss of citizenship are being gradually made easier, while the legal effects of its acquisition and loss are being gradually made less. The present state of things is, indeed, a compromise between two fundamentally different ideas as to the constitution of a political society. Citizenship and its remaining privileges are the outcome of the primitive conception of the state as a personal and permanent union of determinate individuals, for whose exclusive benefit the laws and government of the state exist. Residence, regarded as a title of membership and protection, is the product of the more modern conception of the state, as consisting merely of the inhabitants for the time being of a certain territory. The personal idea is gradually giving place to the territorial, and the present twofold title of membership is the outcome of a compromise between these two co-existent and competing principles. It is not suggested, indeed, that the final issue of legal development will be the total disappearance of personal in favour of territorial membership. A compromise between the two extreme principles, in some such form as that which has now been attained to, may well prove permanent. In the present condition of international relations it is clearly necessary.

We have seen that citizens are those members of a state whose relation to it is personal and permanent, and who, by virtue of this relation, receive from the state special rights, powers, and privileges. If we ask further, what is the title of citizenship, or how this special bond of union is constituted, no general answer is possible. This is a matter of law, varying in different systems, and from time to time in the same system. English law claims as subjects all who are born within the dominions of the Crown, regardless of their descent; while French law, on the contrary, attaches French citizenship to French blood and descent, regardless in general of the place of birth (*k*). Viewed, however, in respect of its historical origin and primitive form, we may say that citizenship has its source in *nationality*. Fellow citizens are those who belong, not merely to the same state, but also to the same nation.

It is quite common to use the terms citizenship and nationality as synonymous, and this usage, though incorrect, is significant of a very real connection between the two ideas. Nationality is membership of a nation; citizenship is one kind of membership of a state. A nation is a society of men united by common blood and descent, and by the various subsidiary bonds incidental thereto, such as common speech, religion and manners. A state, on the other hand, is a society of men united under one government. These two forms of society are not necessarily coincident. A single nation may be divided into several states, and conversely a single state may comprise several nations or parts of nations. The Hellenes were of one blood, but formed many states, while the Roman Empire included many nations, but was one state. Nevertheless nations and states tend mutually to coincidence. The ethnic and the political unity tend to coalesce. In every nation there is an impulse, more or less powerful, to develop into a state—to add to the subsisting community of descent a corresponding community of government and political existence. Conversely, every state tends to become a nation; that is to say, the unity of political organisation eliminates in course of time the national diversities within its borders, infusing throughout all its population a new and common nationality, to the exclusion of all remembered relationship with those beyond the limits of the state.

The historical origin of the conception of citizenship is to be found in the fact that the state has grown out of the

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(*k*) British nationality is acquired in the following ways :—
- (a) By birth in British dominions.
- (b) By descent from a father born in British dominions or naturalised as a British subject.
- (c) By the marriage of an alien woman to a British subject.
- (d) By naturalisation.
- (e) By continued residence in a territory after it has been conquered or otherwise acquired by the British Crown.

nation. Speaking generally, we may say that the state is in its origin the nation politically organised. It is the nation incorporated for the purposes of government and self-defence. The citizens are the members of a nation which has thus developed into a state. Citizenship is nationality that has become political. Men become united as fellow-citizens, because they are, or are deemed to be, already united by the bond of common kinship. It is for their benefit and protection that the body politic has been established, and they are its only members. Their citizenship is simply a legal and artificial bond of union superimposed upon the pre-existing bond of a common nationality. With aliens this national state has no concern. It is not created on their behalf, and they have no part or lot in it, for its law and government are the exclusive birthright of its citizens. Only by slow degrees does the notion of territorial membership arise and make good its claim to legal recognition. Gradually the government and the laws cease to be exclusively national and personal, and become in part territorial also. The new principle makes its way, that the state exists for the benefit and protection of the whole population of a certain territory, and not merely on behalf of a certain nationality. The law becomes more and more that of a country rather than that of a people. State-membership becomes twofold, residence standing side by side with citizenship. It becomes possible to belong to the Roman state without being a Roman. The citizens consent to share their rights with outsiders, but the two classes never reach equality, and the personal union stands permanently on a higher level than the territorial. The special privileges retained by citizens at the present day are the scanty relics of the once exclusive claims of the nation to the protection and activities of the state (*l*).

The relation between a state and its members is one of reciprocal obligation. The state owes protection to its members, while they in turn owe obedience and fidelity to it.

(*l*) On this transition from the national to the territorial idea of the state, see Maine, Early History of Institutions, pp. 72-76. As to the history of the conception and law of citizenship, see Salmond on Citizenship and Allegiance, L. Q. R. xvii. 270, and xviii. 49.

Men belong to a state in order that they may be defended by it against each other and against external enemies. But this defence is not a privilege to be had for nothing, and in return for its protection the state exacts from its members services and sacrifices to which outsiders are not constrained. From its members it collects its revenue; from them it requires the performance of public duties; from them it demands an habitual submission to its will, as the price of the benefits of its guardianship. Its members, therefore, are not merely in a special manner under the protection of the state, but are also in a special manner under its coercion.

This special duty of assistance, fidelity, and obedience, is called *allegiance*, and is of two kinds, corresponding to the two classes of members from whom it is required. Subjects owe *permanent* allegiance to the state, just as they are entitled to its permanent protection. Resident aliens owe *temporary* allegiance during the period of their residence, just as their title to state protection is similarly limited. An alien, when in England, must be faithful to the state, must submit to its will, and obey its laws, even as an Englishman; but when he leaves English shores, he leaves behind him his obligation of allegiance, together with his title to protection. A British subject, on the other hand, takes both of these things with him on his travels. The hand of the state is still upon him for good and evil. If he commits treason abroad he will answer for it in England. The courts of justice will grant him redress even against the agents of the Crown itself; while the executive will see that no harm befalls him at the hands of foreign governments (*m*).

(*m*) Although states are established for the protection of their members, it is not necessary that this protection should be absolutely limited to members. In exceptional cases and to a limited extent the state will use its powers for the defence and benefit of outsiders. War may be waged on behalf of an oppressed nation, and the state may intervene, in the interests of justice, in a quarrel not its own. Nor will it necessarily refuse to administer justice in its courts even to non-resident aliens. But such external protection is exceptional and accidental, and does not pertain to the essence of government. A state is established, not for the defence of all mankind, and not for the maintenance of right throughout all the earth, but solely for the security of its own members, and the administration of its own territory. A state which absolutely refused its protection to all outsiders would none the less adequately fulfil the essential purposes of a political society.

§ 40. The Constitution of the State.

In the definition of a state as a society with a special end and function, there is implied a permanent and definite organisation—a determinate and systematic form, structure, and operation. A body politic is not constituted by a temporary and casual union of individuals, for the purpose of repelling an external enemy, or of executing judgment on some domestic evildoer. The transition from natural to political society is effected only when the union of individuals has assumed a certain measure of permanence and organisation, and when their combined operations in pursuit of their common end have become in a certain degree systematic and definite. It is only when a society has acquired such an organisation, whether by way of agreement, custom, forcible imposition, or otherwise, that it takes on the nature of a body politic or state. It is only then, that there comes into existence the *organ* which is essential to the performance of those *functions* which constitute political government.

The organisation of a modern state is of extraordinary complexity, and it is usual to regard it as divisible into two distinct parts. The first consists of its fundamental or essential elements; the second consists of its secondary elements —the details of state structure and state action. The first, essential, and basal portion is known as the *constitution* of the state. The second has no generic title.

Constitutional law is, as its name implies, the body of those legal rules which determine the constitution of the state. It is not possible to draw any hard and fast line between the constitution and the remaining portions of the state's organisation; neither, therefore, is it possible to draw any such line between constitutional law and other branches of the legal system. The distinction is one of degree, rather than one of kind, and is drawn for purposes of practical convenience, rather than in obedience to any logical requirement. The more important, fundamental, and far-reaching any principle or practice is, the more likely it is to be classed as constitutional. Conversely, the more special, detailed, and limited in its application, the less likely it is to find a place in any exposition of the law and practice of the constitution. The structure of the supreme legislature and the methods of its action pertain to constitutional law; the structure and operations of subordinate legislatures, such as those possessed by the colonies, are justly entitled to the same position; but those of such subordinate legislatures as a borough council would by general consent be treated as not sufficiently important and fundamental to be deemed part of the constitution. So the organisation and powers of the Supreme Court of Judicature, treated in outline and not in detail, pertain to constitutional law; while it is otherwise with courts of inferior jurisdiction, and with the detailed structure and practice of the Supreme Court itself.

In some states, though not in England, the distinction between constitutional law and the remaining portions of the legal system is accentuated and made definite by the embodiment of the former in a special and distinct enactment, the terms of which cannot be altered by the ordinary forms of legislation. Such constitutions are said to be *rigid*, as opposed to those which are *flexible*. That of the United States of America, for example, is set forth in a document agreed upon by the founders of the Commonwealth as containing all those principles of state structure and action sufficiently important to be deemed fundamental and therefore constitutional. The provisions of this document cannot be altered without the consent of three-fourths of the legislatures of the different states. The English constitution on the other hand is flexible; it is defined and set apart in no distinct document, and is not distinguishable from the residue of the law in respect of the methods of its alteration.

We have defined constitutional law as the body of those legal principles which determine the constitution of a state—which determine, that is to say, the essential and fundamental portions of the state's organisation. We have here to face an apparent difficulty and a possible objection. How, it may be asked, can the constitution of a state be determined by law at all? There can be no law unless there is already a state whose law it is, and there can be no state without a constitution.

The state and its constitution are therefore necessarily prior to the law. How, then, does the law determine the constitution? Is constitutional law in reality law at all? Is not the constitution a pure matter of *fact*, with which the law has no concern? The answer is, that the constitution is both a matter of fact and a matter of law. The constitution as it exists *de facto* underlies of necessity the constitution as it exists *de jure*. Constitutional law involves concurrent constitutional practice. It is merely the reflection, within courts of law, of the external objective reality of the *de facto* organisation of the state. It is the theory of the constitution, as received by courts of justice. It is the constitution, not as it is in itself, but as it appears when looked at through the eye of the law.

The constitution as a matter of fact is logically prior to the constitution as a matter of law. In other words, constitutional practice is logically prior to constitutional law. There may be a state and a constitution without any law, but there can be no law without a state and a constitution. No constitution, therefore, can have its source and basis in the law. It has of necessity an extra-legal origin, for there can be no talk of law, until some form of constitution has already obtained *de facto* establishment by way of actual usage and operation. When it is once established, but not before, the law can, and will, take notice of it. Constitutional facts will be reflected with more or less accuracy in courts of justice as constitutional law. The law will develop for itself a theory of the constitution, as it develops a theory of most other things which may come in question in the administration of justice.

As an illustration of the proposition that every constitution has an extra-legal origin, we may take the United States of America. The original constituent states achieved their independence by way of rebellion against the lawful authority of the English Crown. Each of these communities thereupon established a constitution for itself, by way of popular consent expressed directly or through representatives. By virtue of what legal power or authority was this done? Before these constitutions were actually established, there was no law in these colonies save that of England, and it was not by the authority of this law, but in open and forcible defiance of it, that these colonial communities set up new states and new constitutions. Their origin was not merely extra-legal, it was illegal. Yet, so soon as these constitutions succeeded in obtaining *de facto* establishment in the rebellious colonies, they received recognition as legally valid from the courts of those colonies. Constitutional law followed hard upon the heels of constitutional fact. Courts, legislatures, and law had alike their origin in the constitution, therefore the constitution could not derive its origin from them. So, also, with every constitution that is altered by way of illegal revolution. By what legal authority was the Bill of Rights passed, and by what legal title did William III. assume the Crown? Yet the Bill of Rights is now good law, and the successors of King William have held the Crown by valid titles. *Quod fieri non debet, factum valet.*

Constitutional law, therefore, is the judicial theory, reflection, or image of the constitution *de facto*, that is to say, of constitutional practice. Here, as elsewhere, law and fact may be more or less discordant. The constitution as seen by the eye of the law may not agree in all points with the objective reality. Much constitutional doctrine may be sound in law but not true in fact, or true in fact but not sound in law. Power may exist *de jure* but not *de facto*, or *de facto* but not *de jure*. In law, for example, the consent of the Crown is no less necessary to legislation, than is that of the two houses of Parliament: yet in fact the Crown has no longer any power of refusing its consent. Conversely, the whole system of cabinet government, together with the control exercised by the House of Commons over the executive, is as unknown in law as it is well established in fact. Even in respect of the boundaries of the state's territories the law and the fact may not agree. A rebellious province may have achieved its *de facto* independence, that is to say, it may have ceased to be in the *de facto* possession and control of the state, long before this fact receives *de jure* recognition.

Nowhere is this discordance between the constitution in fact and in law more serious and obvious than in England. A statement of the strict legal theory of the British constitution would differ curiously from a statement of the actual facts. Similar discrepancies exist, however, in most other states. A complete account of a constitution, therefore, involves a statement of constitutional custom as well as of constitutional law. It involves an account of the organised state as it exists in practice and in fact, as well as of the reflected image of this organisation as it appears in legal theory.

Although the constitution *de jure* and the constitution *de facto* are not necessarily the same, they nevertheless tend towards coincidence. Constitutional law and practice react upon each other, each striving to assimilate the other to itself. The objective facts of state organisation tend to mould legal theory into conformity with themselves. They seek expression and recognition through legislation, or through the law-creating functions of the courts. Conversely, the accepted legal theory endeavours to realise itself in the facts. The law, although it necessarily involves a pre-existing constitution, may nevertheless react upon and influence the constitution from which it springs. It cannot create a constitution *ex nihilo*, but it may modify to any extent one which already exists. Constitutional practice may alter, while constitutional law remains the same, and *vice versâ*, but the most familiar and effective way of altering the practice is to alter the law. The will of the body politic, as expressed through the legislature and the courts, will commonly realise itself in constitutional fact no less than in constitutional theory.

§ 41. The Government of the State.

By *political* or *civil power* is to be understood the power vested in any person or body of persons of exercising any function of the state. It is the capacity of evoking and directing the activities of the body politic. It is the ability to make one's will effective in any department of governmental action. The aggregate of all the persons or groups of persons who possess any share of this civil power constitutes the *Government* of the state. They are the agents through whom the state, as a corporate unity, acts and moves and fulfils its end.

Legislative, judicial, and executive power. In respect of its subject-matter, civil power is of three kinds, distinguished as legislative, judicial, and executive; and the government is similarly divisible into three great departments, namely, the legislature, the judicature, and the executive. The functions which pertain to the first and second of these departments have been already sufficiently explained. The executive is simply the residue of the government, after deducting the legislature and the judicature.

Sovereign and subordinate power. In respect of its extent civil power, whether legislative, judicial, or executive, is of two kinds, being either sovereign or subordinate. Sovereign or supreme power is that which is absolute and uncontrolled within its own sphere. Within its appointed limits, if any, its exercise and effective operation are not dependent on, or subject to, the power of any other person. An act of sovereign power is one which cannot be prevented or annulled by any other power recognised by the constitution of the state. Subordinate power, on the other hand, is that which, even in its own sphere of operation, is in some degree subject to external control. There exists some other constitutional power which is superior to it, and which can prevent, restrict, or direct its exercise, or annul its operation (*n*).

§ 42. Independent and Dependent States.

States are of two kinds, being either *independent* or *dependent*. An independent or sovereign state is one which possesses a separate existence, being complete in itself, and not merely a part of a larger whole to whose government it is subject. A dependent or non-sovereign state, on the other hand, is one which is not thus complete and self-existent, but is merely a constituent portion of a greater state which includes both it and others, and to whose government it is subject. The British Empire, the United States of America, and the Kingdom of Italy are independent states. But the Commonwealth

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(*n*) The conception of sovereignty is made by many writers the central point in their theory of the state. They lay down certain fundamental propositions with respect to the nature of this power: namely, (1) that its existence is essential in every state; (2) that it is indivisible, and incapable of being shared between two or more different authorities; and (3) that it is necessarily absolute and unlimited in law, that is to say, its sphere of action is legally indeterminate. A discussion of this difficult and important branch of political theory will be found in an Appendix.

of Australia, the Dominion of Canada, and the States of California and New York are dependent, for they are not self-existent, but merely parts of the British Empire and of the United States of America respectively, and subject to their control and government.

It is maintained by some writers that a dependent state is not, properly speaking, a state at all—that the constituent and dependent parts of an independent state may be termed colonies, provinces, territories, and so on, but have no valid claim to the name of state. This objection, however, seems unfounded. It is contrary to the received usage of speech, and that usage seems capable of logical justification. Whether a part of a thing is entitled to the same name as the whole depends on whether the whole and the part possess the same essential nature. A part of a rope is itself a rope, if long enough to serve the ordinary purposes of one; but part of a shilling is not itself a shilling. Whether, therefore, any territorial division of a state is to be classed as itself a state depends on whether, in itself and in isolation, it possesses and fulfils the essential functions of one. This in its turn depends on the extent of the automony or independent activity which is permitted to it by the constitution. Speaking generally, we may say that any such division which possesses a separate legislature, judicature, and executive, and is thus separately organised for the maintenance of peace and justice, is entitled to be regarded as itself a state. The Commonwealth of Australia is a true state, though merely a part of the larger state of the British Empire, for it conforms to the definition of a state, as a society established and organised for the administration of justice and for external defence. Were it to become independent, it could, without altering its constitution, or taking upon itself any further function than those which it now possesses, stand alone as a distinct and self-sufficient political community. But a municipal corporation or a district council has not in itself the nature of a political society, for it does not in itself fulfil the essential ends of one.

International law has traditionally taken account only of independent or sovereign states, for it essentially consists of the rules which regulate the relations of such states to one another. A dependent state is not a technically perfect international unit, and possesses no typically international personality. Internationally regarded, its existence is strictly a mere detail of the internal constitution of the larger and independent state of which it forms a part. This internal structure pertains exclusively to the constitutional law of the state itself, and the law of nations is not concerned with it. The existence of the Dominion of Canada or of the State of Victoria is primarily a constitutional, rather than an international fact, for in the eye of the law of nations the whole British Empire is, at any rate for the most important purposes, a single undivided unit (*o*) (*p*).

(*o*) It is true that the constitution of the League of Nations, as established by the Treaty of Versailles, so far departs from this fundamental principle as to treat self-governing dependencies, for the purposes of that League, as possessing, or as if they possessed, an international status. By what may well be a legal fiction Canada, Australia, South Africa, and New Zealand are to this extent regarded as being what until recently they used not to be, namely, sovereign states: and, more curiously still, India, though not as yet self-governing, receives the same treatment. The international and constitutional consequences of these remarkable departures from inherited principle are not yet fully disclosed. In the year 1930 it is perhaps sufficient to mention that the treatment of the British Dominions and India as possessing, or as if they possessed, an international status is not restricted to proceedings affected by the constitution of the League of Nations, and that, *pari passu* with those developments in the international sphere, the orthodox practice, in their mutual dealings, of His Britannic Majesty's several Governments has come increasingly to be influenced by quasi-diplomatic rather than legalistic conceptions. In what proportions the satisfactory working of a given constitution is dependent respectively on orthodox practice and on law is a question of political science rather than of jurisprudence, at any rate in the narrower senses of that term. Nor need the mere fact that statesmen should lately have judged it fitting, in view of political circumstances, that some of those practices should be solemnly affirmed and *pro tanto* crystallised in official pronouncements be supposed to have compromised their distinctively supra-legal, or at all events extra-legal, character. And, if the student will less need to concern himself with assigning their relative values to law and to usage than with duly appreciating the difference between the two, still less is the propitiousness, in view of those same political circumstances, of reducing by statutory change the gap, on any given point, between legal theory and constitutional practice a question for the analytical jurist, as such.

(*p*) This is a convenient place in which to call attention to the variety of allied meanings possessed by the term state. They are the following :—

(a) A political society dependent or independent.
(b) An independent political society.
(c) The government of a political society.
(d) The territory of a political society.

Except where the context shows that it is not so, we shall use the term in the first of these senses.

§ 43. Unitary and Composite States.

States are of two kinds, being either *unitary* or *composite.* A unitary or simple state is one which is not made up of territorial divisions which are states themselves. A composite state, on the other hand, is one which is itself an aggregate or group of constituent states. The British Empire is composite, because many of its territorial divisions are possessed of such autonomy as to be states themselves. Some of these constituent states are also composite in their turn, Australia and Canada, for example, being composed of unitary states such as Queensland and Quebec.

Composite states are of two kinds, which may be distinguished as imperial and federal. The difference is to be found in the nature of that common or central government which is the necessary bond of union between the constituent states. In an imperial state this common or central government possesses in itself the entire sovereignty of the composite state; the constituent states possess no portion of this sovereignty, but are subordinate to the central and imperial government, being merely instruments of local government possessing delegated authority within their separate territories. In a federal state, on the other hand, the sovereignty of the entire state is divided between the central or federal government and the local governments of the several constituent states. The authority exercised by the federal government consists, not of the entirety of sovereign power, but merely of such parts of it as are vested by the constitution in that federal government instead of being conferred on the constituent states. Similarly, the authority exercised by the constituent states is not a subordinate and delegated authority obtained from the central government, but is a definite share of the supreme authority itself, conferred by the constitution on these constituent states and taken away from the central or federal government. For example, the United States of America is a federal state. The supreme government is divided by the constitution in definite shares between the central or common government and the local governments of the several constituent states. In making laws the State of New York does not exercise subordinate legislative authority by way of delegation from Congress and subject to its overriding authority. The legislature of New York holds in its own hands, and in its own right, the sovereign power of making laws for the territory of New York as to all matters entrusted to the state legislatures by the constitution, and with this state authority the federal legislature cannot interfere. The British Empire, on the other hand, is an imperial, not a federal, state. The central and common government is that of the Imperial Parliament at Westminster. This Parliament holds in its own hands the entirety of sovereign power. All other legislative authority exercised by any constituent state of the Empire is subordinate merely, and exists by way of delegation from the Imperial Parliament. There is no division of supreme power as in a federal constitution; there is merely the local exercise within the constituent states of such subordinate power as the single supreme authority has entrusted to the governments of those states. The Imperial Parliament of the United Kingdom does not bear the same relation to the Parliament of Canada as the Congress at Washington bears to the legislature of California. The former relation is imperial, and the second is federal. The first represents the delegation of supreme power, the second represents the division of it.

In an imperial state it is commonly, but not necessarily, the case that the central or common imperial government is at the same time the local government of one of the constituent states themselves, fulfilling in respect of that particular constituent state the functions which are exercised in the other constituent states by local governments of their own. The British Parliament, for example, possesses this double capacity and fulfils this double function. In its local capacity it legislates for Great Britain, just as a Colonial Parliament legislates for the territory under its control. But in its imperial capacity the Parliament at Westminster is the supreme and common government of the whole Empire, and provides the bond of common authority which unites all the constituent states of the Empire into a single body politic. When an imperial government is thus at the same time the local government of a particular constituent state, it commonly, though not necessarily, derives its authority exclusively from the people of that state, the population of the other constituent states having no share in it. Thus the British Parliament, although it is the imperial government of all the constituent states of the Empire, represents exclusively the constituent state of which it is the local government, namely, Great Britain. This predominance of one constituent part of an imperial state over the other parts is so common a feature of an imperial constitution that it is sometimes regarded as the essence of the matter. This, however, is not so. There may be an imperial state in which every constituent state has a local government of its own, possessing and exercising subordinate and delegated power under the control of a central imperial authority possessing in itself the entirety of sovereign power, but not itself acting as the local government of any particular territory. A true federal state has not been established until this concentration of supreme power has been abolished in favour of the division of it between the constituent states and the central government.

The distinction between a federal and an imperial state applies to composite dependent states, no less than to composite independent states. Australia is a federal dependent state, forming part of the imperial state of the British Empire. The entirety of Australian legislative authority is divided in fixed shares between the central legislature and the local legislatures of the several Australian states. Similarly, a dependent state may itself be organised as a composite imperial state. It may have dependencies of its own under its own imperial government; a colony, for example, may have other colonies subordinate to it. It is also to be observed that a government which is federal with respect to part of the territory of the state, may be imperial with respect to some other part. A federal state may possess dependencies over which the federal government possesses and exercises unlimited and therefore imperial authority, instead of merely the limited authority which it has over the constituent federated states themselves.

SUMMARY.

- Definition of the State.
- Functions of the State
  - Essential
    - Administration of Justice.
    - War.
  - Secondary
- Relations between the two essential functions.
  - The judicial and extrajudicial use of force.
  - Minor differences.
- The territory of the State.
- The members of the State
  - Citizens or subjects.
  - Resident aliens.
  - Citizenship in its historical aspect.
    - Citizenship and nationality.
  - Allegiance
    - Personal and permanent.
    - Local and temporary.
- The constitution of the State.
  - Constitutional law.
    - Its nature.
    - Its relation to constitutional fact.
- The government of the State.
  - Civil power.
    - Legislative, judicial, and executive power.
    - Sovereign and subordinate power.
- Independent and dependent States.
- Unitary and composite States.
- Imperial and federal States.

CHAPTER VI.

THE SOURCES OF LAW.

§ 44. Formal and Material Sources.

THE expression source of law (*fons juris*) has several meanings which it is necessary to distinguish clearly. We must distinguish, in the first place, between the formal and the material sources of the law. By a formal source is to be understood that from which a rule of law derives its force and validity. It is that from which the authority of the law proceeds. The material sources, on the other hand, are those from which is derived the matter, not the validity of the law. The material source supplies the substance of the rule to which the formal source gives the force and nature of law.

The formal source of the whole body of the civil law is one and the same, namely, the will and power of the state as manifested in courts of justice. Whatever rules have the sanction and authority of the body politic in the administration of justice have thereby the force of law; and in such force no other rules whatever have any share. The matter of the law may be drawn from all kinds of material sources, but for its legal validity it must look to the tribunals of the state and to them alone. Customary law, for example, has its material source in the usages of those who are subject to it; but it has its formal source in the will of the state, no less than statutory law itself.

§ 45. Legal and Historical Sources.

Though the formal source of the law is one, its material sources are many, and they are divisible into two classes which may be distinguished as legal and historical. The former are those sources which are recognised as such by the law itself. The latter are those sources which are such in fact, but are nevertheless destitute of legal recognition. This is an important distinction which calls for careful consideration. In respect of its material origin a rule of law is often of long descent. The immediate source of it may be the decision of an English court of justice. But that court may have drawn the matter of its decision from the writings of some lawyer, let us say the celebrated Frenchman, Pothier; and Pothier in his turn may have taken it from the compilations of the Emperor Justinian, who may have obtained it from the prætorian edict. In such a case all these things—the decision, the works of Pothier, the *corpus juris civilis*, and the *edictum perpetuum*—are the successive material sources of the rule of English law. But there is a difference between them, for the precedent is the legal source of the rule, and the others are merely its historical sources. The precedent is its source, not merely in fact, but in law also; the others are its sources in fact, but obtain no legal recognition as such. Our law knows well the nature and effect of precedent, but it knows nothing of Pothier, or of Tribonian, or of the Urban Prætor (*a*). The proposition that every principle embodied in a judicial decision has for the future the force of law is not merely a statement of historical fact as to the growth of English law; it is itself a rule of law. But the proposition that much of the law of Rome has become incorporated into the law of England is simply a statement of fact, which has in law no relevance or recognition.

The legal sources of law are authoritative, the historical are unauthoritative. The former are allowed by the law courts as of right; the latter have no such claim; they influence more or less extensively the course of legal development, but they speak with no authority. No rule of law demands their recognition. Thus both the Statute Book and the works of Jeremy Bentham are material sources of English law. The historians of that system have to take account of both of them. Much that is now established law has its source in the ponderous volumes of the great law reformer. Yet there

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(*a*) For a recent criticism of this passage see Professor C. K. Allen, Law in the Making, 2nd ed., pp. 1 and 158 f. To the editor, however, Sir John Salmond's clear-cut distinction seems intended to be understood as relating, not to the sources, as such, from which the judges derive their legal ideas, but to the species of authority which they habitually ascribe to the several groups of sources. In asserting that "our law . . . knows nothing . . ." the author is personifying the Common Law doctrine, not generalising about the Common Law bench.

is an essential difference between the two cases. What the Statute Book says becomes law forthwith and *ipso jure*; but what Bentham says may or may not become law, and if it does, it is by no claim of right, but solely through the unconstrained discretion of the legislature or the courts. So the decisions of English courts are a legal and authoritative source of English law, but those of American courts are in England merely an historical and unauthoritative source. They are treated with respect by English judges, and are in fact the ground and origin of an appreciable portion of English law, but their operation is persuasive merely, not authoritative, and no rule of English law extends recognition to them.

The legal sources are the only gates through which new principles can find entrance into the law. Historical sources operate only mediately and indirectly. They are merely the various precedent links in that chain of which the ultimate link must be some legal source to which the rule of law is directly attached.

We are here concerned solely with the legal sources of the law. Its formal source is involved in the definition of the law itself, and has been already sufficiently dealt with. Its historical sources pertain to legal history, not to legal theory. Hereafter, when we speak of the sources of law, we shall mean by that term the legal sources exclusively.

It may help us to attain a clearer understanding of a somewhat difficult matter if we attempt to reach a definition of these sources from another standpoint. In every progressive community the law undergoes a continuous process of growth and change. This process of legal evolution does not proceed by haphazard. It is not left to the discretion of the judges to apply one law to-day and another to-morrow, for the growth of the law is itself a matter governed by the law. Every legal system contains certain rules determining the establishment of new law and the disappearance of old. That is to say, it contains certain rules to this effect: that all new principles which conform to such and such requirements are to be recognised as new principles of law, and applied accordingly in substitution for, or as supplementary to the old. Thus it is itself a principle of English law that any principle involved in a judicial decision has the force of law. Similar legal recognition is extended to the law-producing effect of statutes and immemorial customs. Rules such as these establish the sources of the law. A source of law, then, is any fact which in accordance with the law determines the judicial recognition and acceptance of any new rule as having the force of law. It is the legal cause of the admittance by the judicature of any new principle as one which will be observed for the future in the administration of justice.

§ 46. The Legal Sources of English Law.

We cannot deduce from the nature of law the nature of its legal sources, for these are merely contingent and not necessary; they differ in different systems of law and even in the same system in different periods of its growth. Having regard exclusively, however, to the general law of England in modern times, it may be said to proceed from two legal sources, namely, legislation and precedent. The *corpus juris* is divisible accordingly into two parts by reference to the source from which it so proceeds. One part consists of enacted law, having its source in legislation, while the other part consists of case law, having its source in judicial precedents. Less accurately, owing to certain ambiguities inherent in the term, the first part consists of the statute law—to be found in the Statute Book and the other volumes of enacted law—while the second part consists of the common law—to be found in the volumes of the law reports. The nature and authority of these two great sources of English law will form the subject of separate and detailed consideration later. It is sufficient here to indicate their nature in general terms. Legislation is the making of law by the formal and express declaration of new rules by some authority in the body politic which is recognised by the courts of law as competent for that purpose. A precedent, on the other hand, is the establishing of law by the recognition and application of new rules by the courts themselves in the administration of justice. Enacted law comes into the courts *ab extra*; case law is developed within the courts themselves. A new rule so adopted and applied by the courts themselves is not, on the first occasion of its application, a rule of established law; for the courts were under no obligation to adopt that rule rather than another; but when it has once been adopted and applied it becomes law for the future, inasmuch as the courts are bound in the future to follow the precedent so established. The act of the courts in so establishing new law by way of precedent is not an act of legislation or the exercise of legislative authority. They do not make new law by the mere formal declaration of new principles *in abstracto*, but only by the concrete application of a new principle to the facts of an actual case in the ordinary course of the administration of justice.

If we have regard, not merely to the modern and general law of England, but also to that law in earlier times, and to the various forms of special law which exist side by side with the general law, it is necessary to recognise two other legal sources in addition to legislation and precedent. These are custom and agreement, being the sources respectively of customary law and conventional law. Customary law is that which is constituted by those customs which fulfil the requirements laid down by law as the condition of their recognition as obligatory rules of conduct. Conventional law is that which is constituted by agreement as having the force of special law *inter partes*, in derogation of, or in addition to, the general law of the land.

Classified, therefore, by reference to their legal sources, there are four kinds of law:

(a) Enacted law, having its source in legislation;
(b) Case law, having its source in precedent;
(c) Customary law, having its source in custom;
(d) Conventional law, having its source in agreement.

The first three of these sources will be considered in the three following chapters of this book. The fourth, namely, agreement, will be dealt with more suitably at a later stage, in its other and predominant aspect as a source of rights and obligations rather than of law.

§ 47. Sources of Law and Sources of Rights.

The sources of law may also serve as sources of rights. By a source or title of rights is meant some fact which is legally constitutive of rights. It is the *de facto* antecedent of a legal right just as a source of law is the *de facto* antecedent of a legal principle. An examination of any legal system will show that to a large extent the same classes of facts which operate as sources of law operate as sources of rights also. The two kinds of sources form intersecting circles. Some facts create law but not rights; some create rights but not law; some create both at once. An Act of Parliament for example is a typical source of law; but there are numerous private Acts which are clearly titles of legal rights. Such is an Act of divorce, or an Act granting a pension for public services, or an Act incorporating a company. So in the case of precedent, the judicial decision is a source of rights as between the parties to it, though a source of law as regards the world at large. Regarded as creative of rights, it is called a judgment; regarded as creative of law, it is called a precedent. So also immemorial custom does upon occasion give rise to rights as well as to law. In respect of the former operation, it is specifically distinguished as prescription, while as a source of law it retains the generic title of custom. That an agreement operates as a source of rights is a fact too familiar to require illustration. The proposition which really needs emphatic statement in this case is that agreement is not exclusively a title of rights, but is also operative as a source of law.

§ 48. Ultimate Legal Principles.

All rules of law have historical sources. As a matter of fact and history they have their origin somewhere, though we may not know what it is. But not all of them have legal sources. Were this so, it would be necessary for the law to proceed *ad infinitum* in tracing the descent of its principles. It is requisite that the law should postulate one or more first causes, whose operation is ultimate, and whose authority is underived. In other words there must be found in every legal system certain ultimate principles, from which all others are derived, but which are themselves self-existent. Before there can be any talk of legal sources, there must be already in existence some law which establishes them and gives them their authority. The rule that a man may not ride a bicycle on the footpath may have its source in the by-laws of a municipal council; the rule that these by-laws have the force of law has its source in an Act of Parliament. But whence comes the rule that Acts of Parliament have the force of law? This is legally ultimate; its source is historical only, not legal. The historians of the constitution know its origin, but lawyers must accept it as self-existent. It is the law because it is the law, and for no other reason that it is possible for the law itself to take notice of. No statute can confer this power upon Parliament, for this would be to assume and act on the very power that is to be conferred. So also the rule that judicial decisions have the force of law is legally ultimate and underived. No statute lays it down. It is certainly recognised by many precedents, but no precedent can confer authority upon precedent. It must first possess authority before it can confer it.

If we inquire as to the number of these ultimate principles, the answer is that a legal system is free to recognise any number of them, but is not bound to recognise more than one. From any one ultimate legal source it is possible for the whole law to be derived, but one such there must be. A statute, for example, may at any time give statutory authority to the operation of precedent (*b*), and so reduce it from an ultimate to a derivative source of law.

SUMMARY.

- Sources of law
  - Formal—source of the authority of the law.
  - Material—source of the contents of the law.
- Material sources
  - Legal—immediate and legally recognised.
  - Historical—remote and not legally recognised.
- Legal sources
  1. Legislation—enacted law.
  2. Precedent—case-law.
  3. Custom—customary law.
  4. Agreement—conventional law.
- Relation between sources of law and sources of rights.
- Legal principles
  - Ultimate—without legal sources.
  - Derivative—drawn from legal sources.

(*b*) In addition to the formal, historical, and legal sources of the law, it is necessary to note and distinguish what may be termed its literary sources, though this is a Continental, rather than an English use of the term source. The literary sources are the sources of our knowledge of the law, or rather the original and authoritative sources of such knowledge, as opposed to later commentary or literature. The sources of Roman law are in this sense the compilations of the Emperor Justinian, as contrasted with the works of commentators. So the sources of English law are the statute book, the reports, and the older and authoritative text-books, such as Littleton. The literature, as opposed to the sources of our law, comprises all modern text-books and commentaries.

CHAPTER VII.

LEGISLATION.

§ 49. The Nature of Legislation.

LEGISLATION is that source of law which consists in the declaration of legal rules by a competent authority. It is such an enunciation or promulgation of principles as confers upon them the force of law. It is such a declaration of principles as constitutes a legal ground for their recognition as law for the future by the tribunals of the state.

Although this is the strict and most usual application of the term legislation, there are two other occasional uses of it which require to be distinguished. It is sometimes used in a wide sense to include all methods of law-making. To legislate is to make new law in any fashion. Any act done with the intent and the effect of adding to or altering the law is, in this wider sense, an act of legislative authority. As so used, legislation includes all the sources of law, and not merely one of them. "There can be no law," says Austin (*a*), "without a legislative act," Thus when judges establish a new principle by means of a judicial decision, they may be said to exercise legislative, and not merely judicial power. Yet this is clearly not legislation in the strict sense already defined. The law-creative efficacy of precedent is to be found not in the mere declaration of new principles but in the actual application of them. Judges have in certain cases true legislative power—as where they issue rules of court—but in ordinary cases the judicial declaration of the law, unaccompanied by the judicial application of it, has no legal authority whatever. So the act of the parties to a contract, in laying

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(*a*) Austin's Jurisprudence, p. 555, 3rd ed.

down rules of special law for themselves to the exclusion of the common law, is by some regarded as an exercise of legislative power. But although they have made law, they have made it by way of mutual agreement for themselves, not by way of authoritative declaration for other persons.

The writers who make use of the term in this wide sense divide legislation into two kinds, which they distinguish as *direct* and *indirect*. The former is legislation in the narrow sense—the making of law by means of the declaration of it. Indirect legislation, on the other hand, includes all other modes in which the law is made (*b*).

In a third sense, legislation includes every expression of the will of the legislature, whether directed to the making of law or not. In this use, every Act of Parliament is an instance of legislation, irrespective altogether of its purpose and effect. The judicature, as we have seen, does many things which do not fall within the administration of justice in its strict sense; yet in a wider use the term is extended to include all the activities of the courts. So here, the legislature does not confine its action to the making of law, yet all its functions are included within the term legislation. An Act of Parliament may do no more than ratify a treaty with a foreign state, or alter the calendar, or establish a uniform time throughout the realm, or make some change in the style and title of the reigning sovereign, or alter the coinage, or appropriate public money, or declare war or make peace, or grant a divorce, or annex or abandon territory. All this is legislation in a wide sense, but it is not that declaration of legal principles with which, as one of the sources of law, we are here alone concerned.

Law that has its source in legislation may be most accurately termed *enacted* law, all other forms being distinguished as *unenacted*. The more familiar term, however, is *statute law* as opposed to the *common law;* but this, though sufficiently correct for most purposes, is defective, inasmuch as the word statute does not extend to all modes of legislation, but is limited to Acts of Parliament. Blackstone and other

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(*b*) Austin, p. 548, 3rd ed.

writers use the expressions *written* and *unwritten* law to indicate the distinction in question. Much law, however, is reduced to writing even in its inception, besides that which originates in legislation. The terms are derived from the Romans, who meant by *jus non scriptum* customary law, all other, whether enacted or unenacted, being *jus scriptum*. We shall see later, that according to the older theory, as we find it in Blackstone and his predecessors, all English law proceeds either from legislation or from custom. The common law was customary, and therefore, adopting the Roman usage, unwritten law. All the residue was enacted, and therefore written law (*c*).

§ 50. Supreme and Subordinate Legislation.

Legislation is either *supreme* or *subordinate*. The former is that which proceeds from the supreme or sovereign power in the state, and which is therefore incapable of being repealed, annulled, or controlled by any other legislative authority. Subordinate legislation is that which proceeds from any authority other than the sovereign power, and is therefore dependent for its continued existence and validity on some superior or supreme authority. The legislation of the Imperial Parliament is supreme, for "what the parliament doth, no authority upon earth can undo" (*d*). All other forms of legislative activity recognised by the law of England are subordinate. They may be regarded as having their origin in a delegation of the power of Parliament to inferior authorities, which in the exercise of their delegated functions remain subject to the control of the sovereign legislature.

The chief forms of subordinate legislation are five in number.

(1) *Colonial*.—The powers of self-government entrusted to the colonies and other dependencies of the Crown are subject

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(*c*) Constat autem jus nostrum aut ex scripto aut ex non scripto. . . . Ex non scripto jus venit, quod usus comprobavit. Just. Inst. 1. 2. 3.; 1. 2. 9. "The municipal law of England may with sufficient propriety be divided into two kinds: the lex non scripta, the unwritten or common law; and the lex scripta, the written or statute law." Blackstone, I. 63.

(*d*) Blackstone, I. 161.

to the control of the Imperial legislature. The Parliament at Westminster may repeal, alter, or supersede any colonial enactment, and such enactments constitute, accordingly, the first and most important species of subordinate legislation.

(2) *Executive.*—The essential function of the executive is to conduct the administrative departments of the state, but it combines with this certain subordinate legislative powers which have been expressly delegated to it by Parliament, or pertain to it by the common law. A statute, for example, occasionally entrusts to some department of the executive government the duty of supplementing the statutory provisions by the issue of more detailed regulations bearing on the same matter. So it is part of the prerogative of the Crown at common law to make laws for the government of territories acquired by conquest, and not yet possessed of representative local legislatures.

(3) *Judicial.*—In the same way, certain delegated legislative powers are possessed by the judicature. The superior courts have the power of making rules for the regulation of their own procedure. This is judicial legislation in the true sense of the term, differing in this respect from the so-called legislative action of the courts in creating new law by way of precedent.

(4) *Municipal.*—Municipal authorities are entrusted by the law with limited and subordinate powers of establishing special law for the districts under their control. The enactments so authorised are termed by-laws, and this form of legislation may be distinguished as municipal.

(5) *Autonomous.*—All the kinds of legislation which we have hitherto considered proceed from the state itself, either in its supreme or in one or other of its many subordinate departments. But this is not necessarily the case, for legislation is not a function that is essentially limited to the state. The declaration of new principles amounts to legislation not because it is the voice of the state, but because it is accepted by the state as a sufficient legal ground for giving effect to those new principles in its courts of justice. The *will* of the state is, indeed, as we have already seen, the one and only

formal source of law; but it does not follow from this that the *word* of the state is the sole form of that *material* source of the law which is called legislation. In the allowance of new law the state may hearken to other voices than its own. In general, indeed, the power of legislation is far too important to be committed to any person or body of persons save the incorporate community itself. The great bulk of enacted law is promulgated by the state in its own person. But in exceptional cases it has been found possible and expedient to entrust this power to private hands. The law gives to certain groups of private individuals limited legislative authority touching matters which concern themselves. A railway company, for example, is able to make by-laws for the regulation of its undertaking. A university may make statutes binding upon its members. A registered company may alter those articles of association by which its constitution and management are determined. Legislation thus effected by private persons, and the law so created, may be distinguished as *autonomic.*

There is a close resemblance between autonomic law and conventional law, but there is also a real distinction between them. The creation of each is a function entrusted by the state to private persons. But conventional law is the product of agreement, and therefore is law for none except those who have consented to its creation. Autonomic law, on the contrary, is the product of a true form of legislation, and is imposed by superior authority *in invitos.* The act of a general meeting of shareholders in altering the articles of association is an act of autonomous legislation, because the majority has the power of imposing its will in this respect upon a dissentient minority. All the shareholders may in fact agree, but the law-creating efficacy of their resolution is independent of any such accidental unanimity. We may say, if we please, that with respect to consenting shareholders the resolution is an agreement, while with respect to dissentients it is an act of legislative authority. The original articles of association, on the other hand, as they stand when the company is first formed, constitute a body of conventional, not autonomic law.

They are law for all shareholders by virtue of their own agreement to become members of the company, and are not the outcome of any subsequent exercise of legislative authority vested in the majority (*e*).

§ 51. Relation of Legislation to other Sources.

So great is the superiority of legislation over all other methods of legal evolution, that the tendency of advancing civilisation is to acknowledge its exclusive claim, and to discard the other instruments as relics of the infancy of law. The expressed will of the state tends to obtain recognition not only as the sole formal source of law, but as its exclusive material source also. Statute law has already become the type or standard, from which the other forms are more or less abnormal variations. Nothing is more natural than this from our modern point of view, nothing less natural from that of primitive jurisprudence. Early law is conceived as *jus* (the principles of justice), rather than as *lex* (the will of the state). The function of the state in its earlier conception is to *enforce* the law, not to *make* it. The rules so to be enforced are those rules of right which are found realised in the immemorial customs of the nation, or which are sanctioned by religious faith and practice, or which have been divinely revealed to men. It is well known that the earliest codes were deemed the work, not of mortal men, but of the gods (*f*). That the material contents of the law depend upon the express or tacit will of the state, that principles sanctioned by religion or immemorial usage are laws only so long as the prince chooses to retain them unaltered, that it is within the powers and functions of political rulers to change and subvert the laws at their own good pleasure, are beliefs which mark considerable progress along the road of political and legal development. Until such progress has been made, and until

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(*e*) The mere fact that a person who becomes a shareholder must be taken to have impliedly agreed to be bound not only by the articles as they stand, but by any subsequent modification of them, does not render subsequent modifications conventional instead of legislative in their nature. The immediate source of the new rules is not agreement, but imposition by superior authority.

(*f*) Plato's Laws, 624. Spencer's Sociology, II, pp. 515 *et seq.*

the petrifying influence of the primitive alliance of law with religion and immutable custom has been to some extent dissolved, the part played by human legislation in the development of the legal system is necessarily small, and may be even non-existent. As it is the most powerful, so it is the latest of the instruments of legal growth.

In considering the advantages of legislation, it will be convenient to contrast it specially with its most formidable rival, namely precedent. So considered, the first virtue of legislation lies in its abrogative power. It is not merely a source of new law, but is equally effective in abolishing that which already exists. But precedent possesses merely constitutive efficacy; it is capable of producing very good law—better in some respects than that which we obtain by way of legislation—but its defect is that, except in a very imperfect and indirect manner, its operation is irreversible. What it does, it does once for all. It cannot go back upon its footsteps, and do well what it has once done ill. Legislation, therefore, is the indispensable instrument, not indeed of legal growth, but of legal reform. As a destructive and reformative agent it has no equivalent, and without it all law is as that of the Medes and Persians.

The second respect in which legislation is superior to precedent is that it allows an advantageous division of labour, which here, as elsewhere, results in increased efficiency. The legislature becomes differentiated from the judicature, the duty of the former being to make law, while that of the latter is to interpret and apply it. Speaking generally, a legal system will be best administered, when those who administer it have this as their sole function. Precedent, on the contrary, unites in the same hands the business of making the law and that of enforcing it.

It is true, however, that legislation does not necessarily involve any such division of functions. It is not of the essence of this form of legal development that it should proceed from a distinct department of the state, whose business it is to give laws to the judicature. It is perfectly possible for the law to develop by a process of true legislation, in the absence of any legislative organ other than the courts of justice themselves. We have already noticed the existence of this judicial legislation, in considering the various forms of subordinate legislative power. The most celebrated instance of it is the case of the Roman praetor. In addition to his purely judicial functions, he possessed the *jus edicendi*, that is to say, legislative powers in respect of the matters pertaining to his office. It was customary for each praetor at the commencement of his term of office to publish an *edictum* containing a declaration of the principles which he intended to observe in the exercise of his judicial functions. Each such edict was naturally identical in its main outlines with that which preceded it, the alterations made in the old law by each successive praetor being for the most part accepted by his successors. By this exercise of legislative power on the part of judicial officers, a very considerable body of new law was in course of time established, distinguished as the *jus praetorium* from the older *jus civile*. Powers of judicial legislation, not altogether dissimilar in kind, though less in extent, are at the present day very generally conferred upon the higher courts of justice. Yet though not theoretically necessary, it is certainly expedient, that at least in its higher forms, the function of law-making should be vested in a department of the state superior to and independent of the judicature.

A third advantage of statute law is that the formal declaration of it is a condition precedent to its application in courts of justice. Case law, on the contrary, is created and declared in the very act of applying and enforcing it. Legislation satisfies the requirement of natural justice that laws shall be known before they are enforced; but case law operates retrospectively, being created *pro re nata*, and applied to facts which are prior in date to the law itself (*g*).

Fourthly, legislation can by way of anticipation make rules

(*g*) On this and other grounds "judge-made law," as he called it, was the object of constant denunciation by Bentham. "It is the judges," he says in his vigorous way (Works, V. 235), "that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it and then beat him. This is the way you make laws for your dog, and this is the way the judges make laws for you and me."

for cases that have not yet arisen, whereas precedent must needs wait until the actual concrete instance comes before the courts for decision. Precedent is dependent on, legislation independent of, the accidental course of litigation. So far as precedent is concerned, a point of law must remain unsettled, until by chance the very case arises. Legislation can fill up a vacancy, or settle a doubt in the legal system, as soon as the existence of this defect is called to the attention of the legislature. Case law, therefore, is essentially incomplete, uncertain, and unsystematic; while if statute law shows the same defects, it is only through the lethargy or incapacity of the legislature. As a set-off against this demerit of precedent, it is to be observed that a rule formulated by the judicature in view of the actual case to which it is to be applied is not unlikely to be of better workmanship, and more carefully adapted to the ends to be served by it, than one laid down *à priori* by the legislature.

Finally, statute law is greatly superior to case law in point of form. The product of legislation assumes the form of abstract propositions, but that of precedent is merged in the concrete details of the actual cases to which it owes its origin. Statute law, therefore, is brief, clear, easily accessible and knowable, while case law is buried from sight and knowledge in the huge and daily growing mass of the records of bygone litigation. Case law is gold in the mine—a few grains of the precious metal to the ton of useless matter—while statute law is coin of the realm ready for immediate use.

This very perfection of form, however, brings with it a defect of substance from which case law is free. Statute law is embodied in an authoritative form of written words, and this literary expression is an essential part of the law itself. It is the duty of the courts to apply the letter of the law. They are concerned with the spirit and reason of it only so far as the spirit and reason have succeeded in finding expression through the letter. Case law, on the contrary, has no letter. It has no authoritative verbal expression, and there is no barrier between the courts of justice and the very spirit and purpose of the law which they are called on to administer. In interpreting and applying statute law, the courts are concerned with words and their true meaning; in interpreting and applying case law, they are dealing with ideas and principles and their just and reasonable contents and operation. Statute law is rigid, straitly bound within the limits of authoritative formulæ; case law, with all its imperfections, has at least this merit, that it remains in living contact with the reason and justice of the matter, and draws from this source a flexibility and a power of growth and adaptation which are too much wanting in the *litera scripta* of enacted law.

§ 52. Codification.

The advantages of enacted law so greatly outweigh its defects that there can be no doubt as to the ultimate issue of its rivalry with the other forms of legal development and expression. The whole tendency in modern times is towards the process which, since the days of Bentham, has been known as codification, that is to say, the reduction of the whole *corpus juris*, so far as practicable, to the form of enacted law. In this respect England lags far behind the Continent. Since the middle of the eighteenth century the process has been going on in European countries, and is now all but complete. Nearly everywhere the old medley of civil, canon, customary, and enacted law has given place to codes constructed with more or less skill and success. Even in England, and the other countries to which English law has spread, tentative steps are being taken on the same road. Certain isolated and well-developed portions of the common law, such as the law of bills of exchange, of partnership, and of sale, have been selected for transformation into statutory form. The process is one of exceeding difficulty, owing to the complexity and elaboration of English legal doctrine. Many portions of the law are not yet ripe for it, and premature codification is worse than none at all. But the final result is not doubtful.

Codification must not be understood to involve the total abolition of precedent as a source of law. Case law will continue to grow, even when the codes are complete. The old theory, now gradually disappearing, but still true in most departments of the law, is that the common law is the basis and groundwork of the legal system, legislation being nothing more than a special instrument for its occasional modification or development. Unenacted law is the principal, and enacted law is merely accessory. The activity of the legislature is called for only on special occasions to do that which lies beyond the constructive or remedial efficacy of the common law. Codification means, not the total disappearance of case law, but merely the reversal of this relation between it and statute law. It means that the substance and body of the law shall be enacted law, and that case law shall be incidental and supplementary only. In the most carefully prepared of codes subtle ambiguities will come to light, real or apparent inconsistencies will become manifest, and omissions will reveal themselves. No legislative skill can effectually anticipate the complexity and variety of the facts. The function of precedent will be to supplement, to interpret, to reconcile, and to develop the principles which the code contains. Out of the code itself, therefore, a body of case law will grow, as a judicial commentary and supplement. It will be expedient from time to time that this supplementary and explanatory case law be itself codified and incorporated into successive editions of the code. But so often as this is done, the process of interpretation will begin again with the like results.

§ 53. The Interpretation of Enacted Law.

We have seen that one of the characteristics of enacted law is its embodiment in authoritative formulæ. The very words in which it is expressed—the *litera scripta*—constitute a part of the law itself. Legal authority is possessed by the letter, no less than by the spirit of the enactment. Other forms of law (with the exception of written conventional law, which in this respect stands by the side of statutory) have no fixed and authoritative expression. There is in them no letter of the law, to stand between the spirit of the law and its judicial application. Hence it is that in the case of enacted law a process of judicial *interpretation* or *construction* is necessary, which is not called for in respect of customary or case law. By interpretation or construction is meant the process by which the courts seek to ascertain the meaning of the legislature through the medium of the authoritative forms in which it is expressed.

Interpretation is of two kinds, which Continental lawyers distinguish as *grammatical* and *logical*. The former is that which regards exclusively the verbal expression of the law. It does not look beyond the *litera legis*. Logical interpretation, on the other hand, is that which departs from the letter of the law, and seeks elsewhere for some other and more satisfactory evidence of the true intention of the legislature. It is essential to determine with accuracy the relations which subsist between these two methods. It is necessary to know in what circumstances grammatical interpretation is alone legitimate, and when on the contrary it is allowable to accept instead the divergent results that may be attainable by way of logical interpretation. In other words, we have to determine the relative claims of the letter and the spirit of enacted law.

The true principles on this matter seem to be the following. The duty of the judicature is to discover and to act upon the true intention of the legislature—the *mens* or *sententia legis*. The essence of the law lies in its spirit, not in its letter, for the letter is significant only as being the external manifestation of the intention that underlies it. Nevertheless in all ordinary cases the courts must be content to accept the *litera legis* as the exclusive and conclusive evidence of the *sententia legis*. They must in general take it absolutely for granted that the legislature has said what it meant, and meant what it has said. *Ita scriptum est* is the first principle of interpretation. Judges are not at liberty to add to or take from or modify the letter of the law, simply because they have reason to believe that the true *sententia legis* is not completely or correctly expressed by it. That is to say, in all ordinary cases grammatical interpretation is the sole form allowable.

To this general principle there are two exceptions. There are two cases in which the *litera legis* need not be taken as conclusive, and in which the *sententia legis* may be sought from other indications. The first of these cases is that in which the letter of the law is *logically defective*, that is to say, when it fails to express some single, definite, coherent, and complete idea.

The logical defects by which the *litera legis* may be affected are three in number. The first is ambiguity; for a statute, instead of meaning one thing, may mean two or more different things. In such case it is the right and duty of the courts to go behind the letter of the law, and to ascertain from other sources, as best they can, the true intention which has thus failed to attain perfect expression.

When a statutory provision is capable of two meanings, it is commonly, though not invariably, the case that one of these is more natural, obvious, and consonant with the ordinary use of language than the other. The interpretation of an ambiguous law is therefore of two kinds, according as it accepts the more natural and obvious meaning, or rejects it in favour of another which conforms better to the intention of the legislature, though worse to the familiar usages of speech. The former mode of interpretation is termed literal or strict, and the latter may be distinguished as equitable. The general principle is that interpretation must be literal, unless there is some adequate reason to the contrary. In the absence of sufficient indications that the legislature has used words in some less natural and obvious sense, their literal and ordinary signification will be attributed to them. The maintenance of a just balance between the competing claims of these two forms of interpretation is one of the most important elements in the administration of statute law. On each side there are dangers to be avoided. Undue laxity, on the one hand, sacrifices the certainty and uniformity of the law to the arbitrary discretion of the judges who administer it; while undue strictness, on the other hand, sacrifices the true intent of the legislature and the rational development of the law to the tyranny of words. *Scire leges*, said the Romans (*h*), *non hoc est verba earum tenere, sed vim ac potestatem* (*i*).

(*h*) D. 1. 3. 17.

(*i*) Strict interpretation is an equivocal expression, for it means either literal or narrow. When a provision is ambiguous, one of its meanings

A second logical defect of statutory expression is inconsistency. A law, instead of having more meanings than one, may have none at all, the different parts of it being repugnant, so as to destroy each other's significance. In this case it is the duty of the judicature to ascertain in some other way the true *sententia legis*, and to correct the letter of the law accordingly.

Lastly, the law may be logically defective by reason of its incompleteness. The text, though neither ambiguous nor inconsistent, may contain some *lacuna* which prevents it from expressing any logically complete idea. For example, where there are two alternative cases, the law may make provision for one of them, and remain silent as to the other. Such omissions the courts may lawfully supply by way of logical interpretation. It is to be noted, however, that the omission must be such as to make the statute *logically* incomplete. It is not enough that the legislature meant more than it said, and failed to express its whole mind. If what it has said is logically complete—giving expression to a single, intelligible, and complete idea—the courts have no lawful concern with anything else that the legislature may have meant but not said. Their duty is to apply the letter of the law, therefore they may alter or add to it so far as is necessary to make its application possible, but they must do nothing more.

It has been already said that there are two cases in which logical interpretation is entitled to supersede grammatical. The first of these, namely that of some logical defect in the *litera legis*, has been considered. The second is that in which the text leads to a result so unreasonable that it is self-evident that the legislature could not have meant what it has said. For example, there may be some obvious clerical error in the text, such as a reference to a section by the wrong number, or the omission of a negative in some passage in which it is clearly required.

In considering the logical defects of the *litera legis*, we

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may be wider than the other, and the strict (*i.e.*, narrow) sense is not necessarily the strict (*i.e.*, literal) sense. When the equitable interpretation of a law is wider than the literal, it is called extensive; when narrower, it is called restrictive have tacitly assumed that by going behind the defective text it is always possible to discover a logically perfect *sententia legis.* We have assumed that the whole duty of the courts is to ascertain the true and perfect intention which has received imperfect expression. This is not so, however. In a great number of cases the defects of the *litera legis* are simply the manifestation of corresponding defects in the *sententia.* If the legislature speaks ambiguously, it is often because there is no single and definite meaning to be expressed. If the words of the legislature are self-contradictory, it is possibly due to some repugnancy and confusion in the intention itself. If the text contains omissions which make it logically imperfect, the reason is more often that the case in question has not occurred to the mind of the legislature, than that there exists with respect to it a real intention which by inadvertence has not been expressed.

What, then, is the rule of interpretation in such cases? May the courts correct and supplement the defective *sententia legis*, as well as the defective *litera legis?* The answer is that they may and must. If the letter of the law is logically defective, it must be made logically perfect, and it makes no difference in this respect whether the defect does or does not correspond to one in the *sententia legis* itself. Where there is a genuine and perfect intention lying behind the defective text, the courts must ascertain and give effect to it; where there is none, they must ascertain and give effect to the intention which the legislature presumably would have had, if the ambiguity, inconsistency, or omission had been called to mind. This may be regarded as the *dormant* or *latent* intention of the legislature, and it is this which must be sought for as a substitute in the absence of any real and conscious intention (*k*).

In the case of the *sententia*, as formerly in that of the *litera legis*, it is to be noticed that the only defects which the

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(*k*) In the interpretation of contracts, no less than in that of statutes, there is to be noticed this distinction between the real and the latent intention of the parties. The difficulty of construing a contract arises more often from the fact that the parties had no clear intention at all as to the particular point, than from the fact that they failed to express an intention which they actually had.

courts may remedy are *logical* defects. That the intention of the legislature is ethically defective, is not a fact with which the judicature has any concern. The *sententia legis* might have been wiser, juster, or more expedient, had it been wider, or narrower, or other than it actually is. But the courts have no authority to detract from it, add to it, or alter it, on that account. It may be that had a certain case been brought to the notice of the legislature, the statute would have been extended to cover it; but so long as it is logically complete and workable without the inclusion of this case, it must stand as it is. If a statute makes a provision as to sheep, which in common sense ought to have been extended to goats also, this is the affair of the legislature, not of the courts. To correct the *sententia legis* on logical grounds is a true process of interpretation; it fulfils the ultimate or dormant, if not the immediate or conscious intention of the legislature. But to correct it on ethical grounds is to assume and exercise legislative power.

SUMMARY.

Legislation—Its three senses:

1. All forms of law-making
   - Direct legislation.
   - Indirect legislation.
2. All expression of the will of the legislature.
3. The creation of law by way of authoritative declaration.

Law
- Enacted—Statute—Written.
- Unenacted—Common—Unwritten.

Legislation
- Supreme—by the Imperial Parliament.
- Subordinate
  1. Colonial.
  2. Executive.
  3. Judicial.
  4. Municipal.
  5. Autonomous.

Historical relation of legislation to other sources of law.
Superiority of legislation over other sources of law.
Codification.

Interpretation
- Grammatical—based on the *litera legis* exclusively
- Logical
  - *Litera legis* logically defective.
    - Ambiguous.
    - Inconsistent.
    - Incomplete.
  - *Litera legis* containing self-evident error.

Strict and equitable interpretation.
Extensive and restrictive interpretation.

CHAPTER VIII.

PRECEDENT.

§ 54. The Authority of Precedents.

The importance of judicial precedents has always been a distinguishing characteristic of English law. The great body of the common or unwritten law is almost entirely the product of decided cases, accumulated in an immense series of reports extending backwards with scarcely a break to the reign of Edward the First at the close of the thirteenth century. Orthodox legal theory, indeed, long professed to regard the common law as customary law, and judicial decisions as merely evidence of custom and of the law derived therefrom. This, however, was never much better than an admitted fiction. In practice, if not in theory, the common law of England has been created by the decisions of English judges. Neither Roman law, however, nor any of those modern systems which are founded upon it, allows any such place or authority to precedent. They allow to it no further or other influence than that which is possessed by any other expression of expert legal opinion. A book of reports and a text-book are on the same level. They are both evidences of the law; they are both instruments for the persuasion of judges; but neither of them is anything more (*a*). English law, on the other hand, draws a sharp distinction between them. A judicial precedent speaks in England with authority; it is not merely evidence of the law but a source of it; and the courts are bound to follow the law that is so established.

It seems clear that we must attribute this feature of English law to the peculiarly powerful and authoritative posi-

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(*a*) The importance of reported decisions has, however, been increasing in both France and Germany for some time, and Continental law shows a distinct tendency to follow the example of English in this matter.

tion which has been at all times occupied by English judges. From the earliest times the judges of the king's courts have been a small and compact body of legal experts. They have worked together in harmony, imposing their own views of law and justice upon the whole realm, and establishing thereby a single homogeneous system of common law. Of this system they were the creators and authoritative interpreters, and they did their work with little interference either from local custom or from legislation. The centralisation and concentration of the administration of justice in the royal courts gave to the royal judges a power and prestige which would have been unattainable on any other system. The authority of precedents was great in England because of the power, the skill, and the professional reputation of the judges who made them. In England the bench has always given law to the bar; in Rome it was the other way about, for in Rome there was no permanent body of professional judges capable of doing the work that has been done for centuries in England by the royal courts.

§ 55. Declaratory and Original Precedents.

In proceeding to consider the various kinds of precedents and the methods of their operation, we have in the first place to distinguish between those decisions which are creative of the law and those which are merely declaratory of it. A *declaratory* precedent is one which is merely the application of an already existing rule of law; an *original* precedent is one which creates and applies a new rule. In the former case the rule is applied because it is already law; in the latter case it is law for the future because it is now applied. In any well-developed system such as that of modern England, declaratory precedents are far more numerous than those of the other class; for on most points the law is already settled and judicial decisions are therefore commonly mere declarations of pre-existing principles. Original precedents, however, though fewer in number, are greater in importance. For they alone develop the law; the others leave it as it was, and their only use is to serve as good evidence of it for the future. Unless required for this purpose, a merely declaratory decision is not perpetuated as an authority in the law reports. When the law is already sufficiently well evidenced, as when it is embodied in a statute or set forth with fullness and clearness in some comparatively modern case, the reporting of declaratory decisions is merely a needless addition to the great bulk of our case law.

It must be understood, however, that a declaratory precedent is just as truly a source of law as is one belonging to the other class. The legal authority of each is exactly the same. Speaking generally, the authority and legal validity of a precedent do not depend on whether it is, or is not, an accurate statement of previously existing law. Whether it is or is not, it may establish as law for the future that which it now declares and applies as law. The distinction between the two kinds turns solely on their relations to the law of the past, and not at all on their relations to that of the future. A declaratory precedent, like a declaratory statute, is a source of law, though it is not a source of *new* law. Here, as elsewhere, the mere fact that two sources overlap, and that the same legal principle is established by both of them, does not deprive either of them of its true nature as a legal source. Each remains an independent and self-sufficient basis of the rule.

We have already referred to the old theory that the common law is customary, not case law. This doctrine may be expressed by saying that according to it all precedents are declaratory merely, and that their original operation is not recognised by the law of England. Thus Hale says in his History of the Common Law:—

> "It is true the decisions of courts of justice, though by virtue of the laws of this realm they do bind as a law between the parties thereto, as to the particular case in question, till reversed by error or attaint, yet they do not make a law properly so called: for that only the king and parliament can do; yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is; especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times" (*b*).

(*b*) Hale's History of the Common Law, p. 89 (ed. of 1820).

Hale, however, is evidently troubled in mind as to the true position of precedent, and as to the sufficiency of the declaratory theory thus set forth by him, for elsewhere he tells us inconsistently that there are three sources of English law, namely, (1) custom, (2) the authority of Parliament, and (3) "the judicial decisions of courts of justice consonant to one another in the series and succession of time" (*c*).

In the Court of Chancery this declaratory theory never prevailed, nor indeed could it, having regard to the known history of the system of equity administered by that court. There could be no pretence that the principles of equity were founded either in custom or legislation, for it was a perfectly obvious fact that they had their origin in judicial decisions. The judgments of each Chancellor made law for himself and his successors.

> "It must not be forgotten," says Sir George Jessel, "that the rules of courts of equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented" (*d*).

Both at law and in equity, however, the declaratory theory must be totally rejected if we are to attain to any sound analysis and explanation of the true operation of judicial decisions. We must admit openly that precedents make law as well as declare it. We must admit further that this effect is not merely accidental and indirect, the result of judicial error in the interpretation and authoritative declaration of the law. Doubtless judges have many times altered the law while endeavouring in good faith to declare it. But we must recognise a distinct law-creating power vested in them and openly and lawfully exercised. Original precedents are the outcome of the intentional exercise by the courts of their privilege of developing the law at the same time that they administer it.

(*c*) Hale's History of the Common Law, p. 88.
(*d*) *In re Hallet*, 13 Ch. D. at p. 710.

§ 56. Authoritative and Persuasive Precedents.

Decisions are further divisible into two classes, which may be distinguished as authoritative and persuasive. These two differ in respect of the kind of influence which they exercise upon the future course of the administration of justice. An authoritative precedent is one which judges must follow whether they approve of it or not. It is binding upon them and excludes their judicial discretion for the future. A persuasive precedent is one which the judges are under no obligation to follow, but which they will take into consideration, and to which they will attach such weight as it seems to them to deserve. It depends for its influence upon its own merits, not upon any legal claim which it has to recognition. In other words, authoritative precedents are *legal* sources of law, while persuasive precedents are merely *historical*. The former establish law in pursuance of a definite rule of law which confers upon them that effect, while the latter, if they succeed in establishing law at all, do so indirectly, through serving as the historical ground of some later authoritative precedent. In themselves they have no legal force or effect.

The authoritative precedents recognised by English law are the decisions of the superior courts of justice in England. The chief classes of persuasive precedents are the following:

(1) Foreign judgments, and more especially those of American courts (*e*).

(2) The decisions of superior courts in other portions of the British Empire, for example, Irish courts (*f*).

(3) The judgments of the Privy Council when sitting as the final court of appeal from the Colonies (*g*).

(4) Judicial *dicta*, that is to say, statements of law which go beyond the occasion, and lay down a rule that is irrelevant

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(*e*) *Castro* v. *R.*, 6 A. C. p. 249; *Scaramanga* v. *Stamp*, 5 C. P. D. p. 303.

(*f*) *In re Parsons*, 45 Ch. D. 62: "Decisions of the Irish Courts, though entitled to the highest respect, are not binding on English judges."

(*g*) In *Leask* v. *Scott*, 2 Q. B. D. 376, at p. 380, it is said by the Court of Appeal, speaking of such a decision: "We are not bound by its authority, but we need hardly say that we should treat any decision of that tribunal with the greatest respect, and rejoice if we could agree with it."

or unnecessary for the purpose in hand. We shall see later that the authoritative influence of precedents does not extend to such *obiter dicta*, but they are not equally destitute of persuasive efficacy (*h*).

§ 57. The Absolute and Conditional Authority of Precedents.

Authoritative precedents are of two kinds, for their authority is either absolute or conditional. In the former case the decision is absolutely binding and must be followed without question, however unreasonable or erroneous it may be considered to be. It has a legal claim to implicit and unquestioning obedience. Where, on the other hand, a precedent possesses merely conditional authority, the courts possess a certain limited power of disregarding it. In all ordinary cases it is binding, but there is one special case in which its authority may be lawfully denied. It may be overruled or dissented from, when it is not merely wrong, but so clearly and seriously wrong that its reversal is demanded in the interests of the sound administration of justice. Otherwise it must be followed, even though the court which follows it is persuaded that it is erroneous or unreasonable. The full significance of this rule will require further consideration shortly. In the meantime it is necessary to state what classes of decisions are recognised by English law as absolutely, and what as merely conditionally authoritative.

Absolute authority exists in the following cases:—

(1) Every court is absolutely bound by the decisions of all courts superior to itself. A court of first instance cannot question a decision of the Court of Appeal, nor can the Court of Appeal refuse to follow the judgments of the House of Lords.

(2) The House of Lords is absolutely bound by its own decisions. " A decision of this House once given upon a point

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(*h*) Persuasive efficacy, similar in kind though much less in degree, is attributed by our courts to the civil law and to the opinions of the commentators upon it; also to English and American text-books of the better sort.

of law is conclusive upon this House afterwards, and it is impossible to raise that question again as if it was *res integra* and could be re-argued, and so the House be asked to reverse its own decision" (*i*).

(3) The Court of Appeal is, it would seem, absolutely bound by its own decisions and by those of older courts of co-ordinate authority, for example. the Court of Exchequer Chamber (*k*).

In all other cases save these three, it would seem that the authority of precedents is merely conditional. It is to be noticed, however, that the force of a decision depends not merely on the court by which it is given but also on the court in which it is cited. Its authority may be absolute in one court, and merely conditional in another. A decision of the Court of Appeal is absolutely binding on a court of first instance, but is only conditionally binding upon the House of Lords.

§ 58. The Disregard of a Precedent.

In order that a court may be justified in disregarding a conditionally authoritative precedent, two conditions must be fulfilled. In the first place, the decision must, in the opinion of the court in which it is cited, be a *wrong* decision; and it is wrong in two distinct cases: first, when it is contrary to law, and secondly, when it is contrary to reason. It is wrong as contrary to law, when there is already in existence an established rule of law on the point in question, and the decision fails to conform to it. When the law is already settled, the sole right and duty of the judges is to declare and

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(*i*) *London Street Tramways Company* v. *London County Council* (1893) A. C. 375, at p. 379. This is said to be so even when the House of Lords is equally divided in opinion, so that the judgment appealed from stands unreversed and so authoritative. *Beamish* v. *Beamish*, 9 H. L. C. p. 338; *Att.-Gen.* v. *Dean of Windsor*, 8 H. L. C. p. 392. As to the equal division of other courts, see *The Vera Cruz*, 9 P. D. p. 98.

(*k*) *Pledge* v. *Carr*, (1895) 1 Ch. 51; *Lavy* v. *London County Council*, (1895) 2 Q. B. at p. 581, per Lindley, L.J. See, however, *Mills* v. *Jennings*, 13 C. D. p. 648.

apply it. A precedent *must* be declaratory whenever it *can* be, that is to say, whenever there is any law to declare.

But in the second place, a decision may be wrong as being contrary to reason. When there is no settled law to declare and follow, the courts may make law for the occasion. In so doing, it is their duty to follow reason, and so far as they fail to do so, their decisions are wrong, and the principles involved in them are of defective authority. Unreasonableness is one of the vices of a precedent, no less than of a custom and of certain forms of subordinate legislation.

It is not enough, however, that a decision should be contrary to law or reason, for there is a second condition to be fulfilled before the courts are entitled to reject it. If the first condition were the only one, a conditionally authoritative precedent would differ in nothing from one which is merely persuasive. In each case the precedent would be effective only so far as its own intrinsic merits commended it to the minds of successive judges. But where a decision is authoritative, it is not enough that the court to which it is cited should be of opinion that it is wrong. It is necessary in innumerable cases to give effect to precedents notwithstanding that opinion. It does not follow that a principle once established should be reversed simply because it is not as perfect and rational as it ought to be. It is often more important that the law should be certain than that it should be ideally perfect. These two requirements are to a great extent inconsistent with each other, and we must often choose between them. Whenever a decision is departed from, the certainty of the law is sacrificed to its rational development, and the evils of the uncertainty thus produced may far outweigh the very trifling benefit to be derived from the correction of the erroneous doctrine. The precedent, while it stood unreversed, may have been counted on in numerous cases as definitely establishing the law. Valuable property may have been dealt with in reliance on it; important contracts may have been made on the strength of it; it may have become to a great extent a basis of expectation and the ground of mutual dealings. Justice may therefore imperatively require that the decision, though founded in error, shall stand inviolate none the less. *Communis error facit jus* (*l*). "It is better," said Lord Eldon, "that the law should be certain than that every judge should speculate upon improvements in it" (*m*).

It follows from this that, other things being equal, a precedent acquires added authority from the lapse of time. The longer it has stood unquestioned and unreversed, the more harm in the way of uncertainty and the disappointment of reasonable expectations will result from its reversal. A decision which might be properly overruled without hesitation while yet new, may after the lapse of a number of years acquire such increased strength as to be practically of absolute and no longer of merely conditional authority. This effect of lapse of time has repeatedly received judicial recognition.

> "Viewed simply as the decision of a court of first instance, the authority of this case, notwithstanding the respect due to the judges who decided it, is not binding upon us; but viewed in its character and practical results, it is one of a class of decisions which acquire a weight and effect beyond that which attaches to the relative position of the court from which they proceed. It constitutes an authority which, after it has stood for so long a period unchallenged, should not, in the interests of public convenience, and having regard to the protection of private rights, be overruled by this court except upon very special considerations. For twelve years and upwards the case has continued unshaken by any judicial decision or criticism" (*n*).
>
> "When an old decided case has made the law on a particular subject, the Court of Appeal ought not to interfere with it, because people have considered it as establishing the law and have acted upon it" (*o*).

The statement that a precedent gains in authority with age must be read subject to an important qualification. Up to a certain point a human being grows in strength as he grows in age; but this is true only within narrow limits. So with

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(*l*) It is to be remembered that the overruling of a precedent has a retrospective operation. In this respect it is very different from the repeal or alteration of a statute.

(*m*) *Sheddon* v. *Goodrich*, 8 Ves. 497.

(*n*) *Pugh* v. *Golden Valley Railway Company*, 15 Ch. D. at p. 334.

(*o*) *Smith* v. *Keal*, 9 Q. B. D. at p. 352. See also *In re Wallis*, 25 Q. B. D. 180; *Queen* v. *Edwards*, 13 Q. B. D. 590; *Ridsdale* v. *Clifton*, 2 P. D. 306; *Fookes* v. *Beer*, 9 A. C. at p. 630: "We find the law to have been accepted as stated for a great length of time, and I apprehend that it is not now within our province to overturn it."

the authority of judicial decisions. A moderate lapse of time will give added vigour to a precedent, but after a still longer time the opposite effect may be produced, not indeed directly, but indirectly through the accidental conflict of the ancient and perhaps partially forgotten principle with later decisions. Without having been expressly overruled or intentionally departed from, it may become in course of time no longer really consistent with the course of judicial decision. In this way the tooth of time will eat away an ancient precedent, and gradually deprive it of all its authority. The law becomes animated by a different spirit and assumes a different course, and the older decisions become obsolete and inoperative.

To sum the matter up, we may say that to justify the disregard of a conditionally authoritative precedent, it must be erroneous, either in law or in reason, and the circumstances of the case must not be such as to make applicable the maxim, *Communis error facit jus.* The defective decision must not, by the lapse of time or otherwise, have acquired such added authority as to give it a title to permanent recognition notwithstanding the vices of its origin.

The disregard of a precedent assumes two distinct forms, for the court to which it is cited may either overrule it, or merely refuse to follow it. Overruling is an act of superior jurisdiction. A precedent overruled is definitely and formally deprived of all authority. It becomes null and void, like a repealed statute, and a new principle is authoritatively substituted for the old. A refusal to follow a precedent, on the other hand, is an act of co-ordinate, not of superior jurisdiction. Two courts of equal authority have no power to overrule each other's decisions. Where a precedent is merely not followed, the result is not that the later authority is substituted for the earlier, but that the two stand side by side conflicting with each other. The legal antinomy thus produced must be solved by the act of a higher authority, which will in due time decide between the competing precedents, formally overruling one of them, and sanctioning the other as good law. In the meantime the matter remains at large, and the law uncertain.

§ 59. Precedents Constitutive, not Abrogative.

We have already seen the falsity of the theory that all precedents are declaratory. We have seen that they possess a distinct and legally recognised law-creating power. This power, however, is purely constitutive and in no degree abrogative. Judicial decisions may make law, but they cannot alter it, for when there is settled law already on any point the duty of the judges is to apply it without question, and they have no authority to substitute for it law of their own making. Their legislative power is strictly limited to supplying the vacancies of the legal system, to filling up with new law the gaps which exist in the old, to supplementing the imperfectly developed body of legal doctrine.

This statement, however, requires two qualifications. In the first place, it must be read subject to the undoubted power of the courts to overrule or disregard precedents in the manner already described. In its practical effect this is equivalent to the exercise of abrogative power, but in legal theory it is not so. The overruling of a precedent is not the abolition of an established rule of law; it is an authoritative denial that the supposed rule of law has ever existed. The precedent is so treated not because it has made bad law, but because it has never in reality made any law at all. It has not conformed to the requirements of legal efficacy. Hence it is that the overruling of a precedent, unlike the repeal of a statute, has retrospective operation. The decision is pronounced to have been bad *ab initio*. A repealed statute, on the contrary, remains valid and applicable as to matters arising before the date of its repeal. The overruling of a precedent is analogous not to the repeal of a statute, but to the judicial rejection of a custom as unreasonable or as otherwise failing to conform to the requirements of customary law.

In the second place, the rule that a precedent has no abrogative power must be read subject to the maxim, *Quod fieri non debet, factum valet*. It is quite true that judges ought to follow the existing law whenever there is any such law to follow. They are appointed to fulfil the law, not to subvert it. But if by inadvertence or otherwise this rule is broken through, and a precedent is established which conflicts with pre-existing law, it does not follow from this alone that this decision is destitute of legal efficacy For it is a well-known maxim of the law that a thing which ought not to have been done may nevertheless be valid when it is done. If, therefore, a precedent belongs to the class which is absolutely authoritative, it does not lose this authority simply because it is contrary to law and ought not to have been made. No court, for example, will be allowed to disregard a decision of the House of Lords on such a ground; it must be followed without question, whether it is in harmony with prior law or not. So also with those which are merely conditionally authoritative. We have already seen that error is only one of two conditions, both of which are requisite to render allowable the disregard of such a precedent, and in this respect it makes no difference whether the error consists in a conflict with law or in conflict with reason. It may well be better to adhere to the new law which should not have been made than to recur to the old law which should not have been displaced.

§ 60. Grounds of the Authority of Precedents.

The operation of precedents may conveniently be conceived of as based on a legal presumption of the soundness in law of judicial decisions. It is an application of the maxim, *Res judicata pro veritate accipitur*. A matter once formally decided is decided once for all. The courts will listen to no allegation that they have been mistaken, nor will they reopen a matter once litigated and determined. That which has been delivered in judgment must be taken for established doctrine. For in all probability it is sound in fact, and even if not, it is expedient that it should be held as sound none the less. *Expedit reipublicae ut sit finis litium*. When, therefore, a question has one been judicially considĕred and answered, it must be answered in the same way in all subsequent cases in which the same question again arises. Only through this rule can that consistency of judicial decision be obtained, which is essential to the proper administration of justice. Hence the effect of judicial decisions in excluding the *arbitrium judicis* for the future, in providing predetermined answers for the questions calling for consideration in future cases, and therefore in establishing new principles of law.

The questions to which judicial answers are required are either questions purely of law or also in a substantial sense questions of fact. To both kinds the maxim *Res judicata pro veritate accipitur* is applicable. In the case of questions purely of law, this maxim means that the court is presumed to have correctly ascertained and applied the appropriate legal principle. The decision operates, therefore, as proof of the law. It is, or at all events is taken to be, a declaratory precedent. If the law so declared is at all doubtful, the precedent will be worth preserving as useful evidence of it. But if the law is already clear and certain, the precedent will be useless; to preserve it would needlessly cumber the books of reports, and it will be allowed to lapse into oblivion.

In the case of questions which are in a certain sense questions of fact, on the other hand, the presumption of the correctness of judicial decisions results in the establishment of new authority, not in the declaration and confirmation of old. The decision becomes, in a large class of cases, an original precedent. That is to say, the question thus answered ceases to be in any sense one of fact, and becomes for the future purely one of law. For the courts are now provided with a predetermined answer to it, and it is no longer a matter of free judicial discretion. The *arbitrium judicis* is now excluded by one of those fixed and authoritative principles which constitute the law.

For example, the meaning of an ambiguous statute is at first in one sense a pure question of fact. When for the first time the question arises whether the word "cattle" as used by the statute includes horses, the court is bound by no established authority to determine the matter in one way or the other. The occasion is one for the exercise of common sense and technical interpretative skill. But when the question has once been decided, it is for the future one purely of law and no longer in any sense one of fact; for it is incumbent on the courts in subsequent cases to act on the maxim *Res judicata* *pro veritate accipitur*, and to answer the question in the same way as before.

The operation of original precedents is the progressive transformation of questions of fact into questions of law—the term question of fact being here used in its most comprehensive sense as including all questions whatever which are not questions purely of pre-established law. *Ex facto oritur jus.* The growth of case law involves the gradual elimination of that judicial liberty to which it owes its origin. In any system in which precedents are authoritative, the courts are engaged in forging fetters for their own feet.

In respect of this law-creating operation of precedents, questions are divisible into two classes. For some of them do, and some do not, admit of being answered *on principle*. The former are those questions of as yet uncertain law the answer to which is capable of assuming the form of a general principle: the latter are those questions of pure fact the answer to which is necessarily specific. The former are answered by way of abstraction, that is to say, by the elimination of the immaterial elements in the particular case, the result being a general rule applicable not merely to that single case, but to all others which resemble it in its essential features. The other class of questions consists of those in which no such process of abstraction, no such elimination of immaterial elements, as will give rise to a general principle, is possible. The answer to them is based on the circumstances of the concrete and individual case, and therefore produces no rule of general application. The operation of precedent is limited to one only of these classes of questions. Judicial decisions are a source of law only in the case of those questions of fact —or, perhaps we should say, of as yet unascertained law— which admit of being answered on principle. These only are transformed by decision into questions purely of law, for in this case only does the judicial decision establish a rule which can be adopted for the future as a rule of law. Those questions which belong to the other class are permanently questions of fact, and their judicial solution leaves behind it no permanent results in the form of legal principles.

For example, the question whether the defendant did or did not make a certain statement is a question of fact, which does not admit of any answer save one which is concrete and individual. It cannot be answered on principle. It necessarily remains therefore, a pure question of fact; the decision of it is no precedent, and establishes no rule of law. On the other hand, the question whether the defendant in making such a statement was or was not guilty of fraud or negligence, though it may be equally a question of fact, nevertheless belongs to the other class of such questions. It may well be possible to lay down a general principle on a matter such as this. For it is a matter which may be dealt with *in abstracto*, not necessarily *in concreto*. If, therefore, the decision is arrived at on principle, it will amount to an original precedent, and the question, together with every other essentially resembling it, will become for the future a question purely of law, predetermined by the rule thus established.

A precedent, therefore, is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi.* The concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large. "The only use of authorities or decided cases," says Sir George Jessel, "is the establishment of some principle, which the judge can follow out in deciding the case before him" (*p*). "The only thing," says the same distinguished judge in another case, "in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided" (*q*).

This is the true significance of the familiar contrast between authority and principle. It is often said by judges that inasmuch as the matter before them is not covered by authority, they must decide it upon principle. The statement is a sure indication of the impending establishment of an original precedent. It implies two things: first, that where there is any authority on the point, that is to say, where the question is already one of established law, the duty of the

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(*p*) *In re Hallett*, 13 Ch. D. at p. 712.
(*q*) *Osborne* v. *Rowlett*, 13 Ch. D. at p. 785.

judge is simply to follow the path so marked out for him; and secondly, that if there is no authority, and if, therefore, the question, though still one of law, is one on which no direct authority exists it is his duty, if possible, to decide it upon principle, that is to say, to formulate some general rule and to act upon it, thereby establishing law for the future. It may be, however, that the question is one which does not admit of being answered either on authority or on principle, and in such a case a specific or individual answer is alone possible, no rule of law being either applied or established (*r*).

Although it is the duty of courts of justice to decide questions on principle if they can, they must take care in this formulation of principles to limit themselves to the requirements of the case in hand. That is to say, they must not lay down principles which are not required for the due decision of the particular case, or which are wider than is necessary for this purpose. The only judicial principles which are authoritative are those which are thus relevant in their subject-matter and limited in their scope. All others, at the best, are of merely persuasive efficacy. They are not true *rationes decidendi*, and are distinguished from them under the name of *dicta* or *obiter dicta*, things said by the way. The prerogative of judges is not to make law by formulating and declaring it —this pertains to the legislature—but to establish law by applying it. Judicial declaration, unaccompanied by judicial application, is of no authority.

§ 61. The Sources of Judicial Principles.

Whence, then, do the courts derive those new principles, or *rationes decidendi*, by which they supplement the existing law? They are in truth nothing else than the principles of natural justice, practical expediency, and common sense.

(*r*) It is clearly somewhat awkward to contrast in this way the terms authority and principle. It is odd to speak of deciding a case on principle because there is no legal principle on which it can be decided. To avoid misapprehension, it may be advisable to point out that decisions as to the meaning of statutes are always general, and therefore establish precedents and make law. For such interpretative decisions are necessarily as general as the statutory provisions interpreted. A question of statutory interpretation is one of fact to begin with, and is decided on principle; therefore it becomes one of law, and is for the future decided on authority.

Judges are appointed to administer justice—justice according to law, so far as the law extends, but so far as there is no law, then justice according to nature. Where the civil law is deficient, the law of nature takes its place, and in so doing puts on its character also. But the rules of natural justice are not always such that any man may know them, and the light of nature is often but an uncertain guide. Instead of trusting to their own unguided instincts in formulating the rules of right and reason, the courts are therefore wisely in the habit of seeking guidance and assistance elsewhere. In establishing new principles, they willingly submit themselves to various persuasive influences which, though destitute of legal authority, have a good claim to respect and consideration. They accept a principle, for example, because they find it already embodied in some system of foreign law. For since it is so sanctioned and authenticated, it is presumably a just and reasonable one. In like manner the courts give credence to persuasive precedents, to judicial *dicta*, to the opinions of text-writers, and to any other forms of ethical or juridical doctrine which seem good to them. There is, however, one source of judicial principles which is of special importance, and calls for special notice. This is the analogy of pre-existing law. New rules are very often merely analogical extensions of the old. The courts seek as far as possible to make the new law the embodiment and expression of the spirit of the old—of the *ratio juris*, as the Romans called it. The whole thereby becomes a single and self-consistent body of legal doctrine, containing within itself an element of unity and of harmonious development. At the same time it must be remembered that analogy is lawfully followed only as a guide to the rules of natural justice. It has no independent claim to recognition. Wherever justice so requires, it is the duty of the courts, in making new law, to depart from the *ratio juris antiqui*, rather than servilely to follow it.

It is surprising how seldom we find in judicial utterances any explicit recognition of the fact that in deciding questions on principle, the courts are in reality searching out the rules and requirements of natural justice and public policy. The measure of the prevalence of such ethical over purely technical considerations is the measure in which case law develops into a rational and tolerable system as opposed to an unreasoned product of authority and routine. Yet the official utterances of the law contain no adequate acknowledgment of this dependence on ethical influences. "The very considerations," it has been well said, "which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life" (*s*). The chief reason of this peculiarity is doubtless to be found in the fictitious declaratory theory of precedent, and in the forms of judicial expression and reasoning which this theory has made traditional. So long as judges affect to be looking for and declaring old law, they cannot adequately express the principles on which they are in reality establishing new (*t*).

§ 62. Respective Functions of Judges and Juries.

The division of judicial functions between judge and jury creates a difficulty in the theory of precedent which requires some consideration. It is commonly said that all questions of fact are for the jury, and all questions of law for the judge. But we have already seen that original precedents can be considered as answers to questions of fact, transforming them for the future into pure questions of law. Are such precedents, then, made by juries instead of by judges? It is clear that they neither are nor can be. No jury even answers a question on principle; it gives decisions, but no reasons; it decides *in concreto*, not *in abstracto*. In this respect the judicial action of juries differs fundamentally from that of judges. The latter decide on principle, whenever this is possible; they formulate the *ratio decidendi* which underlies their decision; they strive after the general and the abstract, instead of adhering to the concrete and the individual. Hence it is that the decision of a judge may constitute a precedent, while that of a jury cannot. But in composite tribunals, where the jury decides the facts and the judge the law, how does the judge obtain any opportunity of establishing precedents and creating new law? If the matter

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(*s*) Holmes, The Common Law, p. 35.

(*t*) See also an article by Sir Frederick Pollock in 45 L. Q. R. 293, Judicial Caution and Valour.

is already governed by law, it will of course fall within his province; but if it is not already so governed, is it not a pure question of fact which must be submitted to the jury, to the total destruction of all opportunity of establishing any precedent in respect of it? The truth of the matter has already been shown to be that, although all questions of law are for the judge, it is very far from being true that all questions of fact are for the jury. There are very extensive and important portions of the sphere of fact which fall within the jurisdiction of the judge, and it is within those portions that the law-creating operation of judicial decisions takes place. No jury, for example, is ever asked to interpret a statute or, speaking generally, any other written document. Yet unless there is already some authoritative construction in existence, this is evidently in a certain sense a matter of fact. Hence that great department of case law which has its origin in the judicial interpretation of statute law. The general rule—consistently acted on, though seldom expressly acknowledged—is that a judge will not submit to a jury any question which he is himself capable of answering *on principle*. Such a question he answers for himself; for since it can be answered on principle, it provides a fit occasion for the establishment of a precedent and a new rule of law. It *ought* to be a matter purely of law, and can only become what it ought to be, by being kept from the jury and answered *in abstracto* by the judge. The only questions which go to a jury are those questions of pure fact which admit of no principle, and are therefore the appropriate subject-matter of those concrete and unreasoned decisions which juries give (*u*).

We have said that this rule, though acted on, is not expressly acknowledged. The reason is that judges are enabled to avoid the acknowledgment through recourse to the declaratory theory of precedent. As between judge and jury this theory is still in full force and effect, although when the rights and privileges of juries are not concerned, the courts are ready enough at the present day to acknowledge the essential truth

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(*u*) On the decision by judges of questions of fact under the guise of questions of law, see Thayer's Preliminary Treatise on the Law of Evidence, pp. 202, 230, 249.

of the matter. As between judge and jury, questions of fact are withdrawn from the exclusive cognizance of the latter by means of the legal fiction that they are already questions purely of law. They are treated proleptically as being already that which they are about to become. In a completely developed legal system they would be already pure questions of law; the principle for their decision would have been already authoritatively determined. Therefore the judges make bold to deal with them as being already that which they ought to be, and thus the establishment of the law by way of precedent is prevented from openly infringing upon the rights of juries to decide all questions which have not already been decided by the law.

SUMMARY.

- Precedents
  - Declaratory—evidence of old law.
  - Original—sources of new law.
- The declaratory theory of precedent.
- Precedents
  - Authoritative.
  - Persuasive
    - Foreign decisions.
    - Decisions in other parts of the Empire.
    - Privy Council decisions.
    - Judicial *dicta*.
- Precedents
  - Absolutely authoritative
    - Decisions of superior Court.
    - Decisions of House of Lords.
    - Decisions of Court of Appeal.
  - Conditionally authoritative—All others.
- Conditions of the disregard of a precedent.
  - 1. Decision erroneous
    - Contrary to law.
    - Unreasonable.
  - 2. Rejection of it not mischievous as unsettling the law.
- Effect of lapse of time on precedents.
- Distinction between overruling and refusing to follow.
- Precedents constitutive and not abrogative.
  - Qualifications of the rule.
- Ground of the authority of precedent.
- The progressive transformation of fact into law.
- *Rationes decidendi.*
- The determination of questions on principle and on authority.
- Judicial *dicta* contrasted with judicial decisions.
- Sources of judicial principles.
- Respective functions of judge and jury.

CHAPTER IX.

CUSTOM.

§ 63. The Early Importance of Customary Law.

The importance of custom as a source of law continuously diminishes as the legal system grows. As an instrument of the development of English law in particular, it has now almost ceased to operate, partly because it has to a large extent been superseded by legislation and precedent, and partly because of the stringent limitations imposed by law upon its law-creating efficacy. In earlier times it was otherwise. It was long the received theory of English law that whatever was not the product of legislation had its source in custom. Law was either the written statute law, or the unwritten, common, or customary law. Judicial precedent was not conceived as being itself a legal source of law at all, for it was held to operate only as evidence of those customs from which the common law proceeded. *Lex et consuetudo Angliæ* was the familiar title of our legal system. The common law of the realm and the common custom of the realm were synonymous expressions. It may be confidently assumed, indeed, that this doctrine did not at any time express the substantial truth of the matter, and that from the earliest period of English legal history the common law was in fact to a very large extent created and imposed by the decisions of the royal courts of justice, rather than received by these courts from the established customs of the community. However this may be, the identification of the common law with customary law remained the accepted doctrine long after it had ceased to retain any semblance of truth. For some centuries past the true sources of the bulk of our law have been statute and precedent, not statute and custom, and the common law is essentially case law, not customary law. Yet we find Hale in the seventeenth century, and Blackstone in the eighteenth, laying down the older doctrine as still valid (*a*). In the words of Blackstone, " The municipal law of England . . . may with sufficient propriety be divided into two kinds; the *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written or statute law. The *lex non scripta*, or unwritten law, includes not only general customs, or the common law properly so called, but also the particular customs of certain parts of the kingdom; and likewise those particular laws that are by custom observed only in certain courts and jurisdictions." Such language is an echo of the past, not an accurate account of the facts of the present day. Nevertheless even now custom has not wholly lost its law-creating efficacy. It is still to be accounted one of the legal sources of the law of England, along with legislation and precedent, but far below them in importance (*b*).

§ 64. Reasons for the Reception of Customary Law.

There is more than one reason for thus attributing to custom the force of law. In the first place, custom is the embodiment of those principles which have commended themselves to the national conscience as principles of truth, justice, and public utility. The fact that any rule has already the sanction of custom, raises a presumption that it deserves to obtain the sanction of law also. *Via trita via tuta.* Speaking generally, it is well that courts of justice, in seeking for those rules of right which it is their duty to administer, should be content to accept those which have already in their

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(*a*) Hale's History of the Common Law, Ch. II.; Blackstone's Commentaries, I. 63.

(*b*) This relation between law and custom is not confined to English jurisprudence, but is a familiar feature of legal systems in general, more especially in the earlier stages of their development. In Roman law we find the same relation recognised between *mos* and *jus*, *lex* and *consuetudo*. In Justinian's Institutes it is said (I. 2. 9): Ex non scripto jus venit, quod usus comprobavit; nam diuturni mores, consensu utentium comprobati, legem imitantur. Similarly in the Digest (I. 3. 32): Inveterata consuetudo pro lege non immerito custoditur, et hoc est jus quod dicitur moribus constitutum. So in D. 23. 2. 8.: Hoc jus moribus non legibus introductum est. So Gaius at the commencement of his Institutes: Omnes populi qui legibus et moribus reguntur.

favour the prestige and authority of long acceptance, rather than attempt the more dangerous task of fashioning a set of rules for themselves by the light of nature. The national conscience may well be accepted by the courts as an authoritative guide; and of this conscience national custom is the external and visible sign.

Custom is to society what law is to the state. Each is the expression and realisation, to the measure of men's insight and ability, of the principles of right and justice. The law embodies those principles as they commend themselves to the incorporate community in the exercise of its sovereign power. Custom embodies them as acknowledged and approved, not by the power of the state, but by the public opinion of the society at large. Nothing, therefore, is more natural than that, when the state begins to evolve out of the society, the law of the state should in respect of its material contents be in great part modelled upon, and coincident with, the customs of the society. When the state takes up its function of administering justice, it accepts as true and valid the rules of right already accepted by the society of which it is itself a product, and it finds those principles already realised in the customs of the realm. This influence of custom upon law, however, is characteristic rather of the beginnings of the legal system than of its mature growth. When the state has grown to its full strength and stature, it acquires more self-confidence, and seeks to conform national usage to the law, rather than the law to national usage. Its ambition is then to be the source not merely of the form, but of the matter of the law also. But in earlier times it contents itself with conferring the form and nature of law upon the material contents supplied to it by custom.

A second ground of the attribution of law-creative efficacy to custom is to be found in the fact that the existence of an established usage is the basis of a rational expectation of its continuance in the future. Justice demands that, unless there is good reason to the contrary, men's rational expectations shall, so far as possible, be fulfilled rather than frustrated. Even if customs are not ideally just and reasonable, even if it can be shown that the national conscience has gone astray in establishing them, even if better rules might be formulated and enforced by the wisdom of the judicature, it may yet be wise to accept them as they are, rather than to disappoint the expectations which are based upon established practice.

Considerations such as these are sufficient, even in modern times and in fully developed legal systems, to induce the legislature on due occasion to give express statutory authority to bodies of national or local custom. Thus in California the customs developed on the gold-fields for the regulation of the mining industry were given the authority of law by the legislature (*c*). Similarly in New Zealand, when English government and English law were introduced on the founding of the Colony, the legislature thought fit that the aboriginal Maoris should to a large extent continue to live by their own tribal customs, and to this extent those customs were given by statute, and still retain, the authority of law. By the Native Rights Act, 1865, it was enacted that "every title to or interest in land over which the native title has not been extinguished, shall be determined according to the ancient custom and usage of the Maori people, so far as the same can be ascertained."

§ 65. Kinds of Custom.

All custom which has the force of law is of two kinds, which are essentially distinct in their mode of operation. The first kind consists of custom which is operative *per se* as a binding rule of law, independently of any agreement on the part of those subject to it. The second kind consists of custom which operates only indirectly through the medium of agreements whereby it is accepted and adopted in individual instances as conventional law between the parties.

These two kinds of customs may be conveniently distinguished as legal and conventional. A legal custom is one whose legal authority is absolute—one which in itself and *proprio vigore* possesses the force of law. A conventional custom is one whose authority is conditional on its acceptance

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(*c*) Gray on the Nature and Sources of the Law, p. 279.

and incorporation in agreements between the parties to be bound by it.

In the language of English law the term custom is more commonly confined to legal custom exclusively, while conventional custom is distinguished as usage. The distinction so drawn, however, between the terms custom and usage, which in popular speech are synonymous, is by no means universally observed even by lawyers. In any talk of custom, therefore, it is always carefully to be noticed whether the matter referred to is legal custom or conventional custom—custom *stricto sensu* or usage. Occasional failure to appreciate and bear in mind the essential nature of this distinction has been responsible for a good deal that is obscure and difficult in the history and theory of customary law.

Legal custom is itself of two kinds, being either local custom, prevalent and having the force of law in a particular locality only, or the general custom of the realm, in force as law throughout all England. We shall consider in their order, therefore, the three classes of custom, namely (1) conventional custom or usage, (2) local custom, and (3) the general custom of the realm.

§ 66. Conventional Custom.

A usage or conventional custom is, as has been indicated, an established practice which, where it is legally binding, is so not because of any legal authority independently possessed by it, but because it has been expressly or impliedly incorporated in a contract between the parties concerned. Where two men enter into an agreement, they do not commonly set out in words, whether verbal or written, the whole terms of that agreement. Most agreements consist of two parts, namely, the terms expressed and the terms implied. The larger part of most contracts is implied rather than expressed. The expressed terms are merely the framework or skeleton which has to be filled up and transformed into a complete and workable contract by the addition of further terms supplied by implication. It is for the law to supply those implied terms in supplement of the terms expressed by the parties, and a considerable portion of the legal system consists of rules for this purpose—rules, that is to say, for the completion and interpretation of contracts imperfectly and partially expressed by the parties. On a sale of goods, for example, the only expressed terms may be that A will sell his black horse to B for £20; but the additional implied terms supplied by the law take up a considerable portion of the statute known as the Sale of Goods Act. The law, in thus supplementing the expressed intentions of the parties, endeavours to ascertain and conform to their presumed intentions—the intentions which they presumably would have expressed in their contract had the matter been called to their attention and expressly dealt with. This presumed intention is gathered from two chief sources—first, from that which is reasonable. and second, from that which is customary. We are here concerned with the latter consideration only. The law presumes that where persons enter into a contract in any matter in respect of which there exists some established usage, they intend to contract with reference to that usage, and to incorporate it as a term of the contract in the absence of any expressed indication of a contrary intention. He who makes a contract in any particular trade, or in any particular market, is presumed to intend to contract in accordance with the established usages of that trade or market, and he is bound by those usages accordingly as part of his contract. Similarly, where there exist in any locality established usages of agriculture as between landlord and tenant, he who grants or takes a lease of land in that locality is presumed to have accepted these usages as impliedly incorporated in the lease. *In contractibus tacite veniunt ea quae sunt moris et consuetudinis* (*d*). This legal presumption of the conventional acceptance and incorporation of customary rules has resulted in the development of a considerable body of customary law determining the meaning and effect of contracts. The bulk of the law as to bills of exchange and other negotiable instruments, bills of lading and marine insurance, has originated in this manner as customary law. Law so derived from the

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(*d*) Pothier on Obligations, sect. 95.

conventional custom of merchants is known as the law merchant.

Law so originating passes normally through three successive historical stages. In the first stage, the existence of the usage is a question of fact to be determined by evidence in the particular case in which it arises. In the old days, for example, a plaintiff suing on a bill of exchange pleaded that the bill had been drawn and accepted in accordance with the custom of merchants—*secundum consuetudinem mercatorium*—and set out the nature and meaning of that custom, and at the trial mercantile witnesses were called to prove it. The second stage of development is reached when the courts take judicial notice of the custom in question, so that it no longer requires to be specially pleaded or proved in the particular case. It has already been sufficiently proved in previous cases, and has received the authority of the precedents established by those earlier cases. The law derived from that custom has accordingly passed out of its earlier stage as customary law pure and simple, and has become case law, having its immediate source in precedent, though its ulterior and original source was custom. " When a general usage has been judicially ascertained and established, it becomes a part of the law merchant, which courts of justice are bound to know and recognise " (*e*). The third and last stage of historical development which is or may be reached, is that in which the law which has thus its original source in conventional custom, and its secondary source in precedent, is embodied in a statute and so assumes its ultimate form as enacted law. The law of bills of exchange, and the law of marine insurance, which were both in their origin part of the customary law merchant, have now completed this normal course of legal development, and have become *jus scriptum* embodied in the Bills of Exchange Act and the Marine Insurance Act.

It remains to consider the legal requirements which must be fulfilled by a usage or conventional custom before it can

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(*e*) *Brandao* v. *Barnett*, 12 Cl. & F., 787, 805, per Lord Campbell.

thus serve as a source of law and of legal rights and obligations. In the first place, what must be its duration? Must it be an ancient immemorial custom, or is recent custom equally effective? When we come later to deal with legal as opposed to conventional custom, we shall see that the law imposes on the former the requirement of immemorial antiquity. A legal custom—a custom *stricto sensu*—must have endured from time whereof there is no memory. In the case of conventional custom, however, there is no such requirement. No specified duration is legally necessary, nor is any distinction drawn between ancient and modern custom. All that is necessary is that in point of duration the custom shall be so well established, and therefore so notorious, as to render reasonable the legal presumption that it is impliedly incorporated in agreements made in respect of the subject-matter. It was not the ancient but the recently established usage of English merchants as to bills of exchange that served as the source from which the law merchant as to those instruments was derived (*f*).

What must be the extent of a conventional custom? Must it be a general custom of the realm, or is it enough that it should be local merely? We shall see later that a legal custom may be either local or general. So, also, may a conventional custom. It may prevail throughout the realm, as in the case of mercantile customs as to negotiable instruments, or it may be limited to particular localities, as in the case of local usages of agriculture and tenancy. Both classes are sources of law and rights within the scope of their application. Local usages, however, cannot, like general usages, become part of the general or common law of the land.

How far can conventional custom operate as a source of law and rights in conflict with, and in derogation of, the

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(*f*) Thus in the early case of *Noble* v. *Kennoway* (1780), 2 Douglas 510, where the usage of the fishing trade on the coasts of Newfoundland was implied by law as incorporated in and governing a contract of marine insurance, an objection based on the recent origin of the custom was overruled, and Lord Mansfield distinguished in this respect a conventional from a legal custom. "It is no matter if the usage has only been for a year . . . The point is not analogous to a question concerning a common law custom."

general law of the land? The answer is that it may do so to the same extent as express agreement may, and no further. It operates, like express agreement, within the limits of the maxim *modus et conventio vincunt legem*. Certain parts of the law are absolute, and do not admit of being excluded or modified by the agreement of the parties interested; these parts are equally beyond the operation of conventional custom. Other parts of the law are operative only so far as they are not excluded or modified by agreement; and within these portions of the law conventional custom operates in the same manner as agreement. No rule can be established by a usage which could not be established by an express agreement to the same effect (*g*).

In one respect, however, the operation of usage is more restricted than that of express agreement. When a general usage has once been received by judicial recognition into the body of the common law, so that it has now its immediate source in judicial precedent as a rule of case law, the law so constituted cannot be altered by the growth of any later usage in conflict with it. The case law of bills of exchange, for example, had its original source in the customs of merchants, but when once established it is permanent and does not alter with the growth of new and inconsistent usages. If any rule of law so established is to be excluded or modified in any particular case, it must be done by the express agreement of the parties, and not by reliance on any new usage which derogates from the law so constituted. The *consuetudo mercatoria* may make law, but it must for the future conform to the law when once so made (*h*).

(*g*) *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 374.

(*h*) *Edie* v. *East India Company*, 2 Burr. 1216; *Goodwin* v. *Robarts*, L. R. 10 Ex. p. 357: "We must by no means be understood as saying that mercantile usage, however extensive, should be allowed to prevail if contrary to positive law, including in the latter such usages as, having been made the subject of legal decision, and having been sanctioned and adopted by the Courts, have become by such adoption part of the common law. . . And we quite agree that this would apply quite as strongly to an attempt to set up a new usage against one which has become settled and adopted by the common law as to one in conflict with the more ancient rules of the common law itself."

§ 67. Local Custom.

We proceed now to the consideration of legal custom as opposed to conventional custom—of custom in the stricter sense as opposed to usage. Such custom is that which is effective as a source of law and legal rights directly and *per se*, and not merely indirectly through the medium of agreement in the manner already explained.

Legal custom is itself of two kinds, being either local custom or the general custom of the realm. The former is that which prevails in some defined locality only, such as a borough or county, and constitutes a source of law for that place only. The latter is that which prevails throughout England, and constitutes one of the sources of the common law of the land. The term custom in its narrowest sense means local custom exclusively. The general custom of the realm is distinguished from custom in this sense as the common law itself. We shall deal in the first place with local custom, and thereafter with the general custom of the realm (*i*).

The existence in England of local customs having the force of law is illustrated by the following passage from Coke's translation of Littleton's Tenures: (*k*).

> "For the greater part such boroughs have divers customs and usages which be not had in other towns. For some boroughs have such a custom that if a man have issue many sons and dieth, the youngest son shall inherit all the tenements which were his father's within the same borough, as heir unto his father by force of the custom; the which is called Borough English. Also in some boroughs by the custom the wife shall have for her dower all the tenements

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(*i*) The term custom, therefore, has three distinct meanings of various degrees of generality:

(a) As including both legal and conventional custom;

(b) As including legal custom only, conventional custom being distinguished as usage;

(c) As including only one kind of legal custom, namely local custom, as opposed to the general custom of the realm. Thus in Co. Litt. 110 b: "Consuetudo is one of the maine triangles of the lawes of England, these lawes being divided into common law, statute law, and custom."

(*k*) Co. Litt., 110 b.

which were her husband's. Also in some boroughs by the custom a man may devise by his testament his lands and tenements" (*l*).

In order that a local custom may be valid and operative as a source of law, it must conform to certain requirements laid down by law. The chief of these are the following:

1. *Reasonableness.* A custom must be reasonable (*m*). *Malus usus abolendus est.* The authority of usage is not absolute, but conditional on a certain measure of conformity with justice and public utility. It is not meant by this that the courts are at liberty to disregard a custom whenever they are not satisfied as to its absolute rectitude and wisdom, or whenever they think that a better rule could be formulated in the exercise of their own judgment. This would be to deprive custom of all authority, either absolute or conditional. The true rule is that a custom, in order to be denied legal efficacy, must be so obviously and seriously repugnant to right and reason, that to enforce it as law would do more mischief than that which would result from the overturning of the expectations and arrangements based on its presumed continuance and legal validity. We have already seen how the authority of judicial precedents is, in general, similarly conditional rather than absolute; a precedent which is plainly and seriously unreasonable may be overruled instead of followed. We are told in the old books that a similar rule obtains in respect of the authority of Acts of Parliament themselves. It was once held to be good law, that an unreasonable Act of Parliament was void (*n*). This, indeed, is no longer

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(*l*) Most local customs, however, are of a more special and restricted character than those far-reaching invasions of the common law that are instanced by Littleton. They consist for the most part of customary rights vested in the inhabitants of a particular place to the use for divers purposes of land held by others in private ownership : a custom, for example, for the inhabitants of a parish to enter on certain land for the purpose of dancing, games, and recreation, *Hall* v. *Nottingham*, L. R. 1 Ex. D. 1; a custom for the inhabitants of a township to enter on certain land and take water from a spring there, *Race* v. *Ward*, 24 L. J. Q. B. 153; a custom for fishermen in a parish to dry their nets on private land within the parish, *Mercer* v. *Denne* (1905), 2 Ch. 538. Customs of this class are closely analogous to prescriptive easements and profits a prendre vested in individual persons.

(*m*) Co. Litt. 141 a; *The Case of Tanistry*, Dav. Rep. 32; Blackstone, I. 77.

(*n*) "If any general custom were directly against the law of God, or if so, for the law-creating authority of Parliament is absolute. Certain forms of subordinate legislation, however, are still subject to the rule in question; an unreasonable by-law, for example, is as void and unauthoritative as an unreasonable custom or precedent.

2. *Conformity with statute law.* In the second place, a custom must not be contrary to an Act of Parliament. In the words of Coke, "No custom or prescription can take away the force of an Act of Parliament" (*o*). By no length of desuetude can a statute become obsolete and inoperative in law, and by no length of contrary usage can its provisions be modified in the smallest particular. The common law will yield to immemorial local custom, but the enacted law stands for ever (*p*).

It must not be supposed that this rule is one of necessity, derived by logical inference from the nature of things. It is nothing more than a positive principle of the law of England, and a different rule was adopted by Roman law and by the various Continental systems derived from it (*q*). There the recognised maxim is *lex posterior derogat priori.* The latter rule prevails over the earlier, regardless of their respective origins. Legislation has no inherent superiority in this respect over custom. If the enacted law comes first, it can be repealed or modified by later custom; if the customary law is the earlier, it can be similarly dealt with by later enacted law. "If," says Savigny (*r*), "we consider customs

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any statute were made directly against it . . . the custom and statute were void." Doctor and Student, Dial. I., ch. 6. See also *Bonham's Case*, 8 Co. Rep. 118 a; Coke's 2nd Inst. 587; Hobart 87; Blackstone I. 91; Pollock and Maitland, History of English Law, I. 491, 1st ed.; Pollock, Jurisprudence, pp. 262-267, 2nd ed.

(*o*) Co. Litt. 113 a.

(*p*) Blackstone, I. 76.

(*q*) Quare rectissime etiam illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur. D. I. 3. 32. 1. Considerable doubt, however, exists as to the true relation between custom and statute in Roman law, owing to a passage in the Code (C. 8. 53. 2.) which, if read literally, conflicts with the doctrine expressed in the Digest, and declares custom to be destitute of legal effect if contrary to statute law. The ingenuity of German jurists has suggested numerous solutions of the apparent inconsistency, but with no convincing result. See Savigny's System, Vol. I., Appendix II.; Vangerow, Pandekten I., Sect. 16; Dernburg, Pandekten I., Sect. 28.

(*r*) System, Sect. 18.

and statutes with respect to their legal efficacy, we must put them on the same level. Customary law may complete, modify, or repeal a statute; it may create a new rule, and substitute it for the statutory rule which it has abolished." So Windscheid (*s*): "The power of customary law is equal to that of statutory law. It may, therefore, not merely supplement, but also derogate from the existing law. And this is true, not merely of rules of customary law *inter se*, but also of the relations of customary to statute law" (*t*).

3. *Observance as of right.* The third requisite of the operation of a custom as a source of law is that it must have been observed as of right. A merely voluntary practice, not conceived as based on any rule of right or obligation, does not amount to a legal custom, and has no legal operation. A legal custom must be the embodiment in inveterate practice of the conviction of the community as to the rights and obligations of its members towards one another. It is legally effective only because, and only so far as, it is recognised by the law as the expression of an underlying principle of right approved by those who use it. It is this ethical conviction, on which the legal operation of custom is based, that the earlier commentators on the civil law called *opinio necessitatis* (*u*).

4. *Immemorial antiquity.* The fourth and last requirement of a legal custom relates to the length of time during which it has been established. Such custom, to have the force of law, must be immemorial. It must have existed for so long a time that, in the language of the law, "the memory of man runneth not to the contrary." Recent or modern custom is of no account. In the words of Littleton (*x*): "No custom is to be allowed, but such custom as hath been used by title of prescription, that is to say from time out of mind." We shall see later how the idea of immemorial custom was derived by the law of England from the canon law, and by the

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(*s*) Pandektenrecht, Vol. I., Sect. 18.

(*t*) For the similar doctrine of Scottish law see Erskine's Institutes, I. 19.

(*u*) Suarez, De Legibus, VII., 14. 7: Ad consuetudinem necessarium esse, ut eo animo et intentione servetur, ut jus in posterum fiat. See Dernburg, Pandekten, I. Sect. 27. 3; Blackstone, I. 78.

(*x*) Co. Litt. 113 a.

canon law from the civil law. Time immemorial means in the civil and canon law and in the systems derived therefrom, and originally meant in England also, time so remote that no living man can remember it or give evidence concerning it. Custom was immemorial when its origin was so ancient that the beginning of it was beyond human memory, so that no testimony was available as to a time when it did not exist (*y*). In the course of the development of English law, however, a singular change took place in the meaning of this expression. The limit of human memory ceased to be a question of fact and was determined by a curious rule of law which still remains in force. Time of legal memory became distinguished from time of human memory. By an analogical extension of the rule of limitation imposed on actions for the recovery of land by the Statute of Westminster passed in the year 1275, it became an established legal principle that the time of memory reached back as far as the reign of Richard I. and no further. From that day to this the law has remained unaltered. The discordance between the memory of man as it is in fact, and as it is conceived of in law, has steadily grown with the lapse of years, so that at the present day the law of England imputes to living men a faculty of remembrance extending back for seven centuries (*z*).

(*y*) Both in English and foreign law, however, the time of memory was extended by the allowance of tradition within defined limits. A witness might testify not only to that which he had himself seen, but to that which he had been told by others who spoke of their own knowledge. D. 22. 3. 28. Bracton f. 373 a, 318 b. By French law time of memory was held to extend for one hundred years. Pothier, De la Prescription, sects. 278-288.

(*z*) The statute of Westminster I. c. 39, imposed a limitation upon actions for the recovery of land. It provided that no such action should lie, unless the claimant or his predecessor in title had had possession of the land claimed at some time subsequent to the accession of Richard I. The original common law rule of limitation for such actions was no other than the rule as to time immemorial. At common law the claimant had to prove his title and his seisin by the testimony of living men; therefore he or his predecessors must have been in possession within time of human memory. The enactment in question was accordingly construed as laying down a statutory definition of the term time of memory, and this definition was accepted by the courts as valid in all departments of the law in which the idea of time immemorial was relevant. See Blackstone II. 31; Co. Litt. 113 a. The Statute of Quo Warranto, 18 Ed. I. stat. 2, recognised the possession of franchises from the accession of Richard I. as a good prescriptive title.

The rule, therefore, that a custom is invalid unless immemorial means in practice this: that if he who disputes its validity can prove its non-existence at any time between the present day and the twelfth century, it will not receive legal recognition. Thus in the year 1892 a claim by custom to erect stalls for hiring servants at the statute sessions was defeated in the Court of King's Bench by showing that such sessions were first introduced by the Statute of Labourers in the reign of Edward III., and that the custom therefore could not be immemorial as having existed since the reign of Richard Cœur de Lion (*a*). It is not necessary, however, for the upholder of a custom to prove affirmatively that it has existed during the whole period of legal memory. If he can prove that it has existed for a substantial period such as the time of actual human memory, this will be sufficient to raise a presumption of immemorial antiquity, which must be rebutted by him who disputes it (*b*).

It is not difficult to understand the motives which induced the law to impose this stringent limitation upon the efficacy of customs. It was designed in the interests of a uniform system of common law for the whole realm. Had all manner of recent customs been recognised as having the force of local law, the establishment and maintenance of a system of common law would have been rendered impossible. Customary laws and customary rights, infinitely various and divergent, would have grown up so luxuriantly as to have choked that uniform system of law and rights which it was the purpose of the royal courts of justice to establish and administer throughout the realm.

§ 68. Custom and Prescription.

The relation between custom and prescription is such as to demand attention here, although the theory of the latter will receive further consideration in another place. Custom is long practice operating as a source of law; prescription is long practice operating as a source of rights. That all the lands in a certain borough have from time

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(*a*) *Simpson* v. *Wells*, L. R. 7 Q. B. 214.

(*b*) *R.* v. *Jollife*, 2 B. & C. 54; *Bryant* v. *Foot*, L. R. 3 Q. B. 497; *Laurence* v. *Hitch*, L. R. 3 Q. B. 521.

immemorial, on the death of an owner intestate, descended to his youngest son, is a custom, and is the source of a rule of special and customary law excluding in that borough the common law of primogeniture. But that John Styles, the owner of a certain farm, and all his predecessors in title, from time immemorial have used a way over the adjoining farm, is a prescription, and is the source of a prescriptive right of way vested in John Styles.

Regarded historically, the law of prescription is merely a branch of the law of custom. A prescription was originally conceived as a *personal* custom, that is to say, a custom limited to a particular person and his ancestors or predecessors in title. It was distinguished from a local custom, which was limited to an individual place, not to an individual person. Local and personal customs were classed as the two species of *particular* customs, and as together opposed to the general customs of the realm. Coke distinguishes as follows between custom (*i.e.*, local custom) and prescription (*c*): "In the common law, a prescription which is personal is for the most part applied to persons, being made in the name of a certain person and of his ancestors, or those whose estate he hath; or in bodies politique or corporate and their predecessors. . . . And a custome, which is local, is alleged in no person, but layd within some mannor or other place."

Since prescription and custom were thus regarded as two species of the same thing, we find, as might be expected, that they are originally governed by essentially similar rules of law. The requisites of a valid prescription were in essence the same as those of a valid custom. Both must be reasonable, both must be immemorial, both must be consistent with statute law, and so on. It is only by a process of gradual differentiation, and by the later recognition of other forms of prescription not known to the early law, that the difference between the creation of customary law and the creation of prescriptive rights has been brought clearly into view. In the case of custom, for example, the old rule as to time immemorial still subsists, but in the case of prescription it has been superseded by the statutory rules contained in that most unfortunate specimen of legislative skill, the Prescription Act. A prescriptive right to light, for instance, is now finally acquired by enjoyment for twenty years. User during this period is now an absolute title, instead of, as at common law, merely evidence of user during time of memory.

The requirement of immemorial antiquity in respect of custom and prescription was introduced into the English law courts of the twelfth or thirteenth century from the Canon law. In two respects the Canonists developed and rendered more definite the somewhat vague and indeterminate theory of customary law which we find in the writings of the Roman lawyers. In the first place, clear recog-

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(*c*) Co. Litt. 113 b

nition was accorded to the distinction between *jus commune* and *consuetudines*, the former being the common, general, or written law of the whole Church, while the latter consisted of the divergent local and personal customs which were added to, or substituted for, the *jus commune* in particular places or in respect of particular persons. This nomenclature, with the conceptions expressed by it, passed from the Canon law to the law of England.

In the second place the Canonists attempted to supply a defect of the Civil law by laying down a fixed rule as to the necessary duration of customs. They determined that no *consuetudo* was to be held valid, so as to derogate from the *jus commune*, unless it was *praescripta*, that is to say, unless it had endured during the legal period of prescription. *Consuetudo praescripta praejudicat juri communi* (*d*)

What, then, was the period of prescription thus required? On this point we find no agreement among the doctors, for there were several different forms of prescription known to Roman law, and there was no unanimity among the Canonists in the selection of any one of them as a test of the validity of custom. Many favoured the adoption of the ordinary decennial prescription of Roman land law, and held that a custom must have endured for ten years at least, but need have lasted no longer (*e*). Others demanded forty years, since this is the prescription required as against the Church by the legislation of Justinian (*f*). At one time, however, there was a widely held opinion that the true time of prescription required to enable a custom to derogate from the common law of the Church was time immemorial. *Illa consuetudo praejudicat juri, cuius non exstat memoria hominum* (*g*).

This conception of time of memory as a period of prescription was derived from the civil law. Immemorial prescription was there a mode of acquiring servitudes. *Ductus aquae cuius origo memoriam excessit, jure constitui loco habetur* (*h*). The Canon law adopted this rule, and made a more extensive use of it. Immemorial prescription became a supplementary mode of acquisition, available in all cases in which there was no shorter period of prescription to which a claimant might

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(*d*) Decretals 1. 4. 8. Gloss. (Ed. of 1671. Vol. II., p. 92.) Secundum jus canonicum non valet consuetudo, nisi praescripta sit et rationabilis. Decretum, Dist. 1. 4. Gloss. (Vol. I., p. 3). Ad hoc ergo ut consuetudo juri communi praejudicet, requiritur primo quod rationabilis sit, et quod sit praescripta. Decretals 1. 4. 11. 8. Gloss. (Vol. II., p. 96).

(*e*) Suarez, De Legibus, VII. 15. 5.

(*f*) Novel, 131, Ch. 6.

(*g*) Decretals, 1. 4. 11. Gloss. (Vol. II., p. 96). Illa consuetudo praejudicat juri, quae excedit hominum memoriam. Decretum, Dist. VIII c. 7. Gloss (Vol. I., p. 25).

(*h*) D. 43. 20. 3. 4. Fossam jure factam aut cuius memoria non exstat D. 39. 3. 2. 7.

have recourse. From the Canon law it passed into the laws of France, Germany, and England (*i*).

As already stated, many Canonists recognised time immemorial not merely as a period of prescription, but as a condition of the validity of customary law. Suarez, writing at the end of the sixteenth century, tells us, indeed, in the course of an exhaustive examination of the theory of customary law, that in his day this doctrine was no longer received (*k*). Long before Suarez, however, it had established for itself a secure place in the law of England. The Canonical principles of *consuetudo rationabilis et praescripta* and of *tempus immemoriale* were in the thirteenth century at the latest incorporated in our legal system by those ecclesiastical lawyers who laid the foundations of it. This, indeed, was the only form of prescription which obtained recognition from the common law. We find the rule settled with perfect definiteness in the earliest Year Books of Edward I. (*l*).

§ 69. The General Custom of the Realm.

As already indicated legal custom is of two kinds, being either local custom in particular portions of the realm, or general custom prevailing through the realm at large. The first of these has now been sufficiently considered, and it remains to deal with the second. It has been already said, but must be here repeated, that though in modern times the general law of England has its source in legislation and precedent and consists accordingly of enacted law and case law, the earlier doctrine was that the true sources were statutes and the general customs of the realm, and that the law of England, save so far as statutory, was in its true nature customary. English law, like Roman law, was conceived as being *legibus et moribus constitutum*. This was set forth by Blackstone as late as the latter part of the eighteenth century as the authentic doctrine of our law. He says (*m*): "The *lex non scripta*, or unwritten law, includes not only general customs, or the

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(*i*) Pothier, De la Prescription, sects. 278-288; Baudry-Lacantinerie, De la Prescription, sects. 12, 21; Windscheid, I. Sect. 113.

(*k*) Suarez, De Legisbus, VII. 15. 2. Aliqui enim antiqui immemoriale tempus postulabant, tamen sine fundamento, et ita relicta et antiquata est illa sententia.

(*l*) Y. B. 20 and 21 Ed. I. 136. As to the history of immemorial prescription see Die Lehre von der unvordenklichen Zeit, by Friedlander (1843).

(*m*) Commentaries, I. 63.

common law properly so called, but also the particular customs of certain parts of the kingdom." Such language, although no longer true in substance, was a correct expression of the established tradition of English law. In the royal writs by which from the earliest days actions were commenced in the King's courts, the wrongs for which the plaintiff sought redress were alleged to have been committed *contra legem et consuetudinem regni nostri et contra pacem nostram* (*n*). In the law reports of the reign of Henry IV. we find it said (*o*): "The common law of the realm is the common custom of the realm." So in the reign of Edward IV (*p*): "A custom which runs through the whole land is the common law." So the King's judges were sworn to execute justice "according to the law and custom of England" (*q*). So in much later days we find the same doctrine judicially recognised. "Such a custom," says Tindal, C.J. (*r*), "existing beyond the time of legal memory and extending over the whole realm, is no other than the common law of England." So it is said by Best, J. (*s*): "The practice of a particular place is called a custom. A general immemorial practice through the realm is the common law."

No doubt this traditional doctrine did in its origin contain a substantial measure of the truth. Doubtless when, in the earliest days of our law, the King's courts set out about their business of enforcing the King's peace and the King's justice throughout his realm of England, the legal system developed by those courts was largely modelled upon the customs which they found already established there. But doubtless also much of the law so formulated had an entirely different source. While professing to declare and enforce the common custom of the realm, those courts must even in the earliest days have

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(*n*) See, for example, in Fitzherbert's *Natura Brevium*, 90, the writ for a wrongful distress in the king's highway: "Quare bona et catalla ipsius A in regia via cepit . . . contra legem et consuetudinem regni nostri et contra pacem nostram."

(*o*) Y. B. 2 H. 4. 18.

(*p*) Y. B. 8 Edw. IV. 18, 19. *Blundell* v. *Catterall*, 5 B. & Ald. p. 297.

(*q*) 12 Co. Rep. 64.

(*r*) *Veley* v. *Burder*, 12 Ad. & El. 265, 302.

(*s*) *Blundell* v. *Catterall*, 5 B. & Ald. 268, 279.

imposed on the realm much law which had in truth no warrant in national usage, but was derived from the Civil or Canon Law, or natural reason, or some other *fons juris* which commended itself to the royal judges. And this divergence between the early tradition of English law as *moribus constitutum* and the actual truth of the matter has widened from year to year, until that tradition has no longer any substantial conformity with fact. The common law of England has long since ceased to be customary law and become a body of case law instead.

This conclusion leads us to the consideration of a question of some importance and difficulty. We have seen that a legal custom must, if merely local, be of immemorial antiquity. We have also seen that a conventional custom or usage is not subject to any such requirement, and that modern usages become effective as creating law through the medium of contracts in which they are impliedly incorporated. What shall be said in this respect of the general customs of the realm? In order to operate as legal custom, giving rise to law *proprio vigore* and not merely through the medium of agreement, must such a general custom be immemorial, or is a modern or recent custom equally effective to this end?

On this question there is a direct conflict of judicial decision. The particular point in issue was whether the modern custom of merchants could transform bonds and debentures expressed to be payable to bearer into negotiable instruments, contrary to the common law. A negotiable instrument, of which bills of exchange, promissory notes, and cheques are the most important instances, means a security for money which is transferable by delivery so as to confer upon a holder for value in good faith an unimpeachable title, notwithstanding any defect in the title of the last holder from whom he received it. An instrument which is so negotiable conflicts with the common law in two respects. In the first place, a debt is not at common law transferable at all. In the second place, at common law the transferee of property cannot obtain, save in special cases such as the transfer of current coin, any better title than that possessed by the transferor. He who acquires goods from a thief, even for value and in good faith, cannot hold them as against the true owner. Notwithstanding these rules of the common law, it became recognised in the seventeenth century that bills of exchange were negotiable by virtue of the custom of merchants. In the year 1873, in the case of *Crouch* v. *Crédit Foncier of England* (*t*), the question arose in the Court of Queen's Bench whether by recent mercantile custom the same quality of negotiability could be conferred on debentures payable to bearer. It was held by a court of four judges, including Blackburn, J., that this was impossible—that a custom, to produce such an effect, must be an ancient immemorial custom of the realm—and that recent mercantile custom could only operate as a conventional usage, and therefore could not make an instrument negotiable in defiance of the common law. The judgment of the court contains the following passage:

> "Incidents which the parties are competent by express stipulation to introduce into their contracts, may be annexed by custom, however recent, provided that it be general, on the ground that they are tacitly incorporated in the contract. If the wording of an instrument is such as to exclude this tacit incorporation, no usage can annex the incident. But where the incident is of such a nature that the parties are not themselves competent to introduce it by express stipulation, no such incident can be annexed by the tacit stipulation arising from usage. It may be so annexed by the ancient law merchant, which forms part of the law, and of which the courts take notice. Nor, if the ancient law merchant annexes the incident, can any modern usage take it away. . . . It is beyond the competency of the parties to a contract by express words to confer on the assignee of that contract a right to sue in his own name. And we also think it beyond the competency of the parties by express stipulation to deprive the assignee of either the contract or the property represented by it, of his right to take back his property from any one to whom a thief may have transferred it, even though the transferee took it bona fide and for value. As these stipulations, if express, would have been ineffectual, the tacit stipulations implied from custom must be equally ineffectual."

In the year 1875, in the case of *Goodwin* v. *Robarts* (*u*), the contrary conclusion was reached by the Court of Exchequer

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(*t*) L. R. 8 Q. B. 374.

(*u*) L. R. 10 Ex. 33.

Chamber. Cockburn, C.J., delivering the judgment of the court, speaks as follows after referring to the argument that modern custom cannot make an instrument negotiable:

> "Having given the fullest consideration to this argument we are of opinion that it cannot prevail. It is founded on the view that the law merchant thus referred to is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and as it were coeval with it. But as a matter of legal history this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatorio*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience, the court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon or incorporated into the common law, and may thus be said to form part of it."

In view of this striking conflict of judicial opinion, what conclusion is to be drawn on this important question as to the operation of modern custom as a source of law? The conclusion here suggested as correct is that, on the general principle (leaving aside for the time being the particular case of negotiable instruments), the reasoning of Blackburn, J., and the Court of Queen's Bench in the earlier case of *Crouch* v. *Crédit Foncier of England* is logically unanswerable. The only custom which can operate as a legal custom creating law *proprio vigore* in derogation of the common law, is ancient immemorial custom. It is only *consuctudo praescripta* which can in this manner derogate from the *jus commune.* Modern usage operates only as conventional custom, and therefore only through the medium of terms implied in a contract between the parties concerned. In strict logic, therefore, modern custom, as pointed out in *Crouch* v. *Crédit Foncier*, cannot establish any rule which the parties to a contract could not establish as conventional law between themselves. It cannot, therefore, logically be regarded as operating *inter alios* so as to make an instrument negotiable in violation of the principles of the common law. To hold, in opposition to this reasoning, that the modern custom of merchants or of any other class of the community possesses any general authority to derogate from the common law, except so far as express agreement may derogate from it, would be to establish a far-reaching and revolutionary principle of unknown extent and consequence, for which there is no sufficient justification in principle or authority, and which would be inconsistent with the permanence and uniformity of the established law of the land. The very same considerations of public interest which induced our early law to impose upon local custom the requirement of immemorial antiquity are applicable with equal force to the general customs of the realm. The public interest requires that modern custom shall conform to the law, and not that the law shall conform automatically to newly established customs.

A logical application of this general principle would necessitate the conclusion reached in *Crouch* v. *Crédit Foncier* that modern custom was powerless to make instruments negotiable. The law, however, is not always logical. It is often drawn from the straight course by accidents of historical development. There can be little doubt that, in the special case of negotiable instruments, the authority of the Exchequer Chamber in *Goodwin* v. *Robarts* will prevail over that of the Queen's Bench in the earlier case. Negotiability by modern mercantile usage obtained recognition in the seventeenth century in the case of bills of exchange by an anomalous and illogical application of the doctrine of conventional custom, and it is in all probability too late now to question the application of the rule so recognised to all other instruments payable to bearer by the custom of merchants. Almost all the *lex mercatoria* which has been derived from mercantile usage was derived by a correct and logical application of the general principle of conventional custom as already explained. For those rules were for the most part such as might have been established by express agreement, and therefore were equally within the operation of usage. Here and there, however, by an illogical and anomalous extension, the courts allowed, as derived from conventional custom, certain rules which in strictness could only be derived from that immemorial custom which operates *proprio vigore*. One of these cases is the recognition of the rule that the delivery of an instrument can operate as an assignment of the debt represented thereby, in breach of the rule of common law that debts are not assignable. Had the true limits of the operation of conventional custom or usage as formulated in *Crouch* v. *Crédit Foncier* been strictly adhered to by the courts of the seventeenth century, bills of exchange would not have been recognised as assignable at law. The courts would have maintained the dissentient doctrine of Holt, C.J., that Lombard Street could not to this extent give laws to Westminster Hall (*x*). After much hesitation and conflict of opinion, however, mercantile custom was ultimately recognised as operative for this purpose. Finally, in *Miller* v. *Race* (*y*), in the year 1758, the courts recognised that instruments so transferable by custom were negotiable in the full sense that the transferee acquired a title independent of the title of the transferor. This rule was an analogical extension of the common law rule as to the title to coin of the realm. Bills of exchange and bank notes were recognised as equivalent to coin for this purpose. The rule as to coin was extended to all securities for money which by mercantile usage passed from hand to hand as if they were money. These rules, though anomalous, and though received by an illogical application of the doctrine of commercial usage, must nevertheless be now accepted as an authentic part of the common law. In all probability the law is that all securities for money which by mercantile usage are transferable by delivery, are in law negotiable instruments. But the allowance of this exceptional and anomalous rule,

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(*x*) 6 Mod. 29.

(*y*) 1 Burr. 452.

as now established by authoritative precedent, does not involve the allowance of the general doctrine, repudiated by *Crouch* v. *Crédit Foncier*, that modern mercantile usage has any general authority whereby it can add to or derogate from the common law in matters in which express agreement is not similarly competent.

Accepting, therefore, as true the proposition that the general custom of the realm must, like local custom, be of immemorial antiquity in order to constitute legal custom having in itself the force of law, it follows that general custom is no longer at the present day a living and operative source of English law. It may be taken as certain that all of the general and immemorial customs of the realm have long since received judicial notice and application by the courts of law, and have therefore been transformed into case law which has its immediate source in precedent. The ancient doctrine that the common law of the realm consists of the common custom of the realm (which was never at the best more than an approximation to the truth), has now been transformed into the sounder doctrine that the common law of the realm consists of the law which has been declared and created by the reported decisions of the superior courts of justice.

SUMMARY.

Historical Importance of Customary Law.
Reasons for the recognition of Customary Law.
The Kinds of Custom:
    Conventional custom—usage.
    Legal custom—custom *stricto sensu.*
Conventional custom or usage.
    A source of law determining the interpretation and operation of agreements.
    The origin of the law merchant.
    The stages of development of such law.
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Local custom.
    A source of local law *proprio vigore.*
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        1. Reasonableness.
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Crouch v. *Crédit Foncier* and *Goodwin* v. *Robarts*.

History of the law as to negotiable instruments.

BOOK II.

ELEMENTS OF THE LAW.

CHAPTER X.

LEGAL RIGHTS.

§ 70. Wrongs.

We have seen that the law consists of the principles in accordance with which justice is administered by the state, and that the administration of justice consists in the use of the physical force of the state in enforcing rights and punishing the violation of them. The conception of a right is accordingly one of fundamental significance in legal theory, and the purpose of this chapter is to analyse it, and to distinguish its various applications. Before attempting to define a right, however, it is necessary to define two other terms which are closely connected with it, namely, wrong and duty.

A wrong is simply a wrong act—an act contrary to the rule of right and justice. A synonym of it is injury, in its true and primary sense of *injuria* (that which is contrary to *jus*), though by a modern perversion of meaning this term has acquired the secondary sense of harm or damage (*damnum*) whether rightful or wrongful, and whether inflicted by human agency or not.

Wrongs or injuries are divisible for our present purpose into two kinds, being either moral or legal. A moral or natural wrong is an act which is morally or naturally wrong, being contrary to the rule of natural justice. A legal wrong is an act which is legally wrong, being contrary to the rule of legal justice and a violation of the law. It is an act which is authoritatively determined to be wrong by a rule of law, and is therefore treated as a wrong in and for the purposes of the administration of justice by the state. It may or may not be a wrong in deed and in truth, and conversely a moral wrong may or may not be a wrong in law. Natural and legal wrongs, like natural and legal justice, form intersecting circles, this discordance between law and fact being partly intentional and partly the result of imperfect historical development.

In all ordinary cases the legal recognition of an act as a wrong involves the repression or punishment of it by the physical force of the state, this being the essential purpose for which the judicial action of the state is ordained. We shall see later, however, that such forcible constraint is not an invariable or essential incident, and that there are other possible forms of effective legal recognition. The essence of a legal wrong consists in its recognition as wrong by the law, not in the resulting repression or punishment of it. A legal wrong is a violation of *justice according to law*.

§ 71. Duties.

A duty is an obligatory act, that is to say, it is an act the opposite of which would be a wrong. Duties and wrongs are correlatives. The commission of a wrong is the breach of a duty, and the performance of a duty is the avoidance of a wrong. A synonym of duty is obligation, in its widest sense, although in a special and technical application the latter term denotes one particular kind of duty only, as we shall see later.

Duties, like wrongs, are of two kinds, being either moral or legal. A moral or natural duty is an act the opposite of which would be a moral or natural wrong. A legal duty is an act the opposite of which would be a legal wrong. It is an act recognised as a duty by the law, and treated as such in and for the purposes of the administration of justice by the state. These two classes are partly coincident and partly distinct. A duty may be moral but not legal, or legal but not moral, or both at once.

When the law recognises an act as a duty, it commonly enforces the performance of it, or punishes the disregard of it. But this sanction of legal force is in exceptional cases absent. A duty is legal because it is legally recognised, not necessarily because it is legally enforced or sanctioned. There are legal duties of imperfect obligation, as they are called, which will be considered by us at a later stage of our inquiry.

§ 72. Rights.

A right is an interest recognised and protected by a rule of right. It is any interest, respect for which is a duty, and the disregard of which is a wrong.

All that is right or wrong, just or unjust, is so by reason of its effects upon the interests of mankind (*a*), that is to say, upon the various elements of human well-being, such as life, liberty, health, reputation, and the uses of material objects. If any act is right or just, it is so because and in so far as it promotes some form of human interest. If any act is wrong or unjust, it is because the interests of men are prejudicially affected by it. Conduct which has no influence upon the interests of any one has no significance either in law or morals.

Every wrong, therefore, involves some interest attacked by it, and every duty involves some interest to which it relates, and for whose protection it exists. The converse, however, is not true. Every attack upon an interest is not a wrong, either in fact or in law, nor is respect for every interest a duty, either legal or natural. Many interests exist *de facto* and not also *de jure;* they receive no recognition or protection from any rule of right. The violation of them is no wrong, and respect for them is no duty. For the interests of men conflict with each other, and it is impossible for all to receive rightful recognition. The rule of justice selects some for protection, and the others are rejected.

The interests which thus receive recognition and protection from the rules of right are called rights. Every man who has a right to any thing has an interest in it also, but he may have an interest without having a right. Whether his interest amounts to a right depends on whether there exists with respect to it a duty imposed upon any other person. In other words, a right is an interest the violation of which is a wrong (*b*).

(*a*) This statement, to be strictly correct, must be qualified by a reference to the interests of the lower animals. It is unnecessary, however, to complicate the discussion at this stage by any such consideration. The interests and rights of beasts are moral, not legal. See § 19, *supra* and § 109 *infra*.

(*b*) Cf., however, Gray, The Nature and Sources of the Law, p. 19. "The right is not the interest itself; it is the means by which enjoyment of the interest is secured."

Every right corresponds to a rule of right, from which it proceeds, and it is from this source that it derives its name. That I have a *right* to a thing means that it is *right* that I should have that thing. All right is *the* right of him for whose benefit it exists, just as all wrong is *the* wrong of him whose interests are affected by it. In the words of Windscheid (*c*), "*Das* Recht ist *sein* Recht geworden."

Rights, like wrongs and duties, are either moral or legal. A moral or natural right is an interest recognised and protected by a rule of natural justice—an interest the violation of which would be a moral wrong, and respect for which is a moral duty. A legal right, on the other hand, is an interest recognised and protected by a rule of legal justice—an interest the violation of which would be a legal wrong done to him whose interest it is, and respect for which is a legal duty. "Rights," says Ihering (*d*), "are legally protected interests."

Bentham set the fashion still followed by many of denying that there are any such things as natural rights at all. All rights are legal rights and the creation of the law. "Natural law, natural rights," he says (*e*), "are two kinds of fictions or metaphors, which play so great a part in books of legislation, that they deserve to be examined by themselves. . . . Rights properly so called are the creatures of law properly so called; real laws give rise to real rights. Natural rights are the creatures of natural law; they are a metaphor which derives its origin from another metaphor." "In many of the cultivated," says Spencer (*f*), criticising this opinion, "there has been produced a confirmed and indeed contemptuous denial of rights. There are no such things, say they, except such as are conferred by law. Following Bentham, they affirm that the state is the originator of rights, and that apart from it there are no rights."

A complete examination of this opinion would lead us far into the regions of ethical rather than juridical conceptions, and would here be out of place. It is sufficient to make two

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(*c*) Pandekt. I. sect. 37.

(*d*) Geist d. r. R. III. p. 339, 4th ed.

(*e*) Theory of Legislation (Dumont, Hildreth's trans. 8th ed.), pp. 82—84. See also Works, III. 217.

(*f*) Principles of Ethics, II. p. 63.

observations with respect to the matter. In the first place, he who denies the existence of natural *rights* must be prepared at the same time to reject natural or moral *duties* also. Rights and duties are essentially correlative, and if a creditor has no natural right to receive his debt, the debtor is under no moral duty to pay it to him. In the second place, he who rejects natural *rights* must at the same time be prepared to reject natural *right*. He must say with the Greek Sceptics that the distinction between right and wrong, justice and injustice, is unknown in the nature of things, and a matter of human institution merely. If there are no rights save those which the state creates, it logically follows that nothing is right and nothing is wrong save that which the state establishes and declares as such. If natural justice is a truth and not a delusion, the same must be admitted of natural rights (*g*).

It is to be noticed that in order that an interest should become a legal right, it must obtain not merely legal protection, but also legal recognition. The interests of beasts are to some extent protected by the law, inasmuch as cruelty to animals is a criminal offence. But beasts are not for this reason possessed of legal rights. The duty of humanity so enforced is not conceived by the law as a duty *towards* beasts, but merely as a duty *in respect* of them. There is no bond of legal obligation between mankind and them. The only interest and the only right which the law recognises in such a case is the interest and right of society as a whole in the welfare of the animals belonging to it. He who ill-treats a child violates a duty which he owes to the child, and a right which is vested in him. But he who ill-treats a dog breaks no *vinculum juris* between him and it, though he disregards the obligation of humane conduct which he owes to society or the state, and the correlative right which society or the state possesses. Similarly a man's interests may obtain legal protection as against himself, as when drunkenness or suicide is made a crime. But he has not for this reason a legal right against himself. The duty to refrain from drunkenness is not conceived by the law as a duty owing by a man to himself, but as one owing by him to the community. The only interest which receives legal recognition is that of the society in the sobriety of its members.

Although a legal right is commonly accompanied by the

(*g*) The denial of natural rights is not rendered any more defensible by the recognition of other *positive* rights in addition to the strictly legal rights which are created by the State; for example, rights created by international law, or by the so-called law of public opinion.

power of instituting legal proceedings for the enforcement of it, this is not invariably the case, and does not pertain to the essence of the conception. As we shall see, there are classes of legal rights which are not enforceable by any legal process; for example, debts barred by prescription or the lapse of time. Just as there are imperfect and unenforceable legal duties, so there are imperfect and unenforceable legal rights.

Rights and duties are necessarily correlative. There can be no right without a corresponding duty, or duty without a corresponding right, any more than there can be a husband without a wife, or a father without a child. For every duty must be a duty *towards* some person or persons, in whom therefore, a correlative right is vested. And conversely every right must be a right *against* some person or persons, upon whom, therefore, a correlative duty is imposed. Every right or duty involves a *vinculum juris* or bond of legal obligation, by which two or more persons are bound together. There can be no duty unless there is some one to whom it is due; there can be no right unless there is some one from whom it is claimed; and there can be no wrong unless there is some one who is wronged, that is to say, whose right has been violated.

We must therefore reject the opinion of those writers who distinguish between *relative* and *absolute* duties, the former being those which have rights corresponding to them, and the latter being those which have none (*h*). This opinion is held by those who conceive it to be of the essence of a right, that it should be vested in some determinate person, and be enforceable by some form of legal process instituted by him. On this view, duties towards the public at large or towards indeterminate portions of the public have no correlative rights; the duty, for example, to refrain from committing a public nuisance. There seems no sufficient reason, however, for defining a right in so exclusive a manner. All duties towards the public correspond to rights vested in the public, and a public wrong is necessarily the violation of a public right. All duties correspond to rights, though they do not all correspond to private rights vested in determinate individuals.

(*h*) See Austin, Lect. 17.

§ 73. The Elements of a Legal Right.

In the idea of a legal right the five following elements are essentially involved:—

(1) A *person* in whom it is vested and who may be distinguished as the *owner* of the right, the *subject* of it, or the person *entitled*.

(2) A *person* against whom the right avails, and upon whom the correlative duty lies. He may be distinguished as the person *bound*, or as the *subject* of the duty.

(3) An *act* or *omission* which is obligatory on the person bound in favour of the person entitled. This may be termed the *content* of the right.

(4) Some *thing* to which the act or omission relates, and which may be termed the *object* or *subject-matter* of the right.

(5) A *title*: that is to say, certain facts or events by the operation of which the right has become vested in its owner.

Thus if A. buys a piece of land from B., A. is the subject or owner of the right so acquired. The persons bound by the correlative duty are persons in general, for a right of this kind avails against all the world. The content of the right consists in non-interference with the purchaser's exclusive use of the land. The object or subject-matter of the right is the land. And finally the title of the right is the conveyance by which it was acquired from its former owner (*i*).

Every right, therefore, involves a threefold relation in which the owner of it stands:—

(1) It is a right *against* some *person* or persons.

(*i*) The terms subject and object are used by different writers in a somewhat confusing variety of senses:—

(a) The subject of a right means the owner of it; the object of a right means the thing in respect of which it exists. This is the usage which has been here adopted: Windscheid, I. sect. 49.

(b) The subject of a right means its subject-matter (that is to say, its object in the previous sense). The object of a right means the act or omission to which the other party is bound (that is to say, its content): Austin, pp. 47, 712.

(c) Some writers distinguish between two kinds of subjects—active and passive. The active subject is the person entitled; the passive subject is the person bound: Baudry-Lacantinerie, Des Biens, sect. 4.

(2) It is a right *to* some *act* or omission of such person or persons.

(3) It is a right *over* or *to* some *thing* to which that act or omission relates.

An ownerless right is an impossibility. There cannot be a right without a subject in whom it inheres, any more than there can be weight without a heavy body; for rights are merely attributes of persons, and can have no independent existence. Yet although this is so, the ownership of a right may be merely contingent or uncertain. The owner of it may be a person indeterminate. He may even be a person who is not yet born, and may therefore never come into existence. Although every right has an owner, it need not have a *vested* and *certain* owner. Thus the fee simple of land may be left by will to a person unborn at the death of the testator. To whom does it belong in the meantime? We cannot say that it belongs to no one, for the reasons already indicated. We must say that it is presently owned by the unborn person, but that his ownership is contingent on his birth.

Who is the owner of a debt in the interval between the death of the creditor intestate and the vesting of his estate in an administrator? Roman law in such a case personified the inheritance itself, and regarded the rights contingently belonging to the heir as presently vested in the inheritance by virtue of its fictitious personality. According to English law before the Judicature Act, 1873, the personal property of an intestate, in the interval between death and the grant of letters of administration, was deemed to be vested in the Judge of the Court of Probate, and it may be assumed that it now vests either in the President of the Probate, Divorce and Admiralty Division, or in the Judges of the High Court collectively. But neither the Roman nor the English fiction is essential. There is no difficulty in saying that the estate of an intestate is presently owned by an *incerta persona*, namely by him who is subsequently appointed the administrator of it. The law, however, abhors a temporary vacuum of vested ownership. It prefers to regard all rights as presently vested in some determinate person, subject, if need be, to be divested on the happening of the event on which the title of the contingent owner depends (*k*).

Certain writers define the object of a right with such narrowness that they are forced to the conclusion that there are some rights which have no objects. They consider that the object of a right means some material thing to which it relates; and it is certainly true that in this sense an object is not an essential element in the conception. Others admit that a person, as well as a material thing, may be the object of a right; as in the case of a husband's right in respect of his wife, or a father's in respect of his children. But they go no further, and consequently deny that the right of reputation, for example, or that of personal liberty, or the right of a patentee, or a copyright, has any object at all.

The truth seems to be, however, that an object is an essential element in the idea of a right. A right without an object in respect of which it exists is as impossible as a right without a subject to whom it belongs. A right is, as we have said, a legally protected interest; and the object of the right is the thing in which the owner has this interest. It is the thing, material or immaterial, which he desires to keep or to obtain, and which he is enabled to keep or to obtain by means of the duty which the law imposes on other persons. We may illustrate this by classifying the chief kinds of rights by reference to their objects.

(1) *Rights over material things.*—In respect of their number and variety, and of the great mass of legal rules relating to them, these are by far the most important of legal rights. Their nature is too familiar to require illustration.

(2) *Rights in respect of one's own person.*—I have a right not to be killed, and the object of this right is my life. I have a right not to be physically injured or assaulted, and the object of this right is my bodily health and integrity. I have a right not to be imprisoned save in due course of law; the object of this right is my personal liberty—that is to say,

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(*k*) As to ownerless rights, see Windscheid, I. sect. 49, n. 3. Dernburg, Pandekten, I. sect. 49.

my power of going where I will. I have a right not to be coerced or deceived into acting contrary to my desires or interests; the object of this right is my ability to fulfil my desires and protect and promote my interests by my own activities.

(3) *The right of reputation.*—In a man's reputation, that is to say, in the good opinion that other persons have of him, he has an interest, just as he has an interest in the money in his pockets. In each case the interest has obtained legal recognition and protection as a right, and in each case the right involves an object in respect of which it exists.

(4) *Rights in respect of domestic relations.*—Every man has an interest and a right in the society, affections, and security of his wife and children. Any person who without just cause interferes with this interest, as by the seduction of his wife or daughter, or by taking away his child, is guilty of a violation of his rights. The wrongdoer has deprived him of something which was his, no less than if he had robbed him of his purse.

(5) *Rights in respect of other rights.*—In many instances a right has another right as its subject-matter. I may have a right against A., that he shall transfer to me some right which is now vested in himself. If I contract with him for the sale of a piece of land to me, I acquire thereby a right against him, that he shall so act as to make me the owner of certain rights now belonging to himself. By the contract I acquire a right to the right of ownership, and when the conveyance has been executed, I acquire the right of ownership itself. Similarly a promise of marriage vests in the woman a right to the rights of a wife; but the marriage vests in her those rights themselves (*l*).

It is commonly a question of importance, whether the right acquired by an agreement or other transaction is merely a right to a right, or is one having something else than another right as its immediate object. If I buy a ton of coal or a flock of sheep, the right which I thereby acquire may be of either

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(*l*) See as to rights to rights, Windscheid, I. sect. 48 a (Rechte an Rechten).

of these kinds according to circumstances. I may become forthwith the owner of the coal or the sheep; that is to say, my right may have these material things as its immediate and direct object. On the other hand, I may acquire merely a right against the seller, that he by delivery or otherwise shall make me the owner of the things so purchased. In this case I acquire a right which has, as its immediate and direct object, nothing more than another right; though its mediate and indirect object may be said, truly enough, to be the material things purchased by me.

(6) *Rights over immaterial property.*—Examples of these are patent-rights, copyrights, trade-marks, and commercial good-will. The object of a patent-right is an invention, that is to say, the *idea* of a new process, instrument, or manufacture. The patentee has a right to the exclusive use of this idea. Similarly the object of literary copyright is the form of literary expression produced by the author of a book. In this he has a valuable interest by reason of the disposition of the public to purchase copies of the book, and by the Copyright Act this interest has been raised to the level of a legal right.

(7) *Rights to services.*—Finally we have to take account of rights vested in one person to the services of another: the rights, for example, which are created by a contract between master and servant, physician and patient, or employer and workman. In all such cases the object of the right is the skill, knowledge, strength, time, and so forth, of the person bound. If I hire a physician, I obtain thereby a right to the use and benefit of his skill and knowledge, just as, when I hire a horse, I acquire a right to the use and benefit of his strength and speed.

Or we may say, if we prefer it, that the object of a right of personal service is the *person* of him who is bound to render it. A man may be the subject-matter of rights as well as the subject of them. His mind and body constitute an instrument which is capable of certain uses, just as a horse or a steam-engine is. In a law which recognises slavery, the man may be bought and sold, just as the horse or steam-engine may. But in our own law this is not so, and the only right that can be acquired over a human being is a temporary and limited right to the use of him, created by voluntary agreement with him—not a permanent and general right of ownership over him.

§ 74. Legal Rights in a Wider Sense of the Term.

Hitherto we have confined our attention to legal rights in the strictest and most proper sense. It is in this sense only that we have regarded them as the correlatives of legal duties, and have defined them as the interests which the law protects by imposing duties with respect to them upon other persons. We have now to notice that the term is also used in a wider and laxer sense, to include any legally recognised interest whether it corresponds to a legal duty or not. In this generic sense a legal right may be defined as any advantage or benefit which is in any manner conferred upon a person by a rule of law. Of rights in this sense there are at least three distinct kinds, sufficiently important to call for separate classification and discussion. These are (1) *Rights* (in the strict sense), (2) *Liberties*, and (3) *Powers*. Having already sufficiently considered the first of these, we shall now deal briefly with the others.

§ 75. Liberties.

Just as my legal rights (in the strict sense) are the benefits which I derive from legal duties imposed upon other persons, so my legal liberties are the benefits which I derive from the absence of legal duties imposed upon myself. They are the various forms assumed by the interest which I have in doing as I please. They are the things which I may do without being restrained by the law. The sphere of my legal liberty is that sphere of activity within which the law is content to leave me alone. It is clear that the term right is often used in a wide sense to include such liberty. I have a right (that is to say, I am at liberty), to do as I please with my own; but I have no right and am not at liberty to interfere with what is another's. I have a right to express my opinions on public affairs, but I have no right to publish a defamatory or seditious libel. I have a right to defend myself against violence, but I have no right to take revenge upon him who has injured me.

The interests of unrestrained activity thus recognised and allowed by the law constitute a class of legal rights clearly distinguishable from those which we have already considered. Rights of the one class are concerned with those things which other persons *ought* to do for me; rights of the other class are concerned with those things which I *may* do for myself. The former pertain to the sphere of obligation or compulsion; the latter to that of liberty or free will. Both are legally recognised interests; both are advantages derived from the law by the subjects of the state; but they are two distinct species of one genus.

It is often said that all rights whatsoever correspond to duties; and by those who are of this opinion a different explanation is necessarily given of the class of rights which we have just considered. It is said that a legal liberty is in reality a legal right not to be interfered with by other persons in the exercise of one's activities. It is alleged that the real meaning of the proposition that I have a legal right to express what opinions I please, is that other persons are under a legal duty not to prevent me from expressing them. So that even in this case the right is the correlative of a duty. Now there is no doubt that in most cases a legal liberty of acting is accompanied by a legal right not to be hindered in so acting. If the law allows me a sphere of lawful and innocent activity, it usually takes care at the same time to protect this sphere of activity from alien interference. But in such a case there are in reality two rights and not merely one; and there are instances in which liberties are not thus accompanied by protecting rights. I may have a legal liberty which involves no such duty of non-interference imposed on others. If a landowner gives me a licence to go upon his land, I have a right to do so, in the sense in which a right means a liberty; but I have no right to do so, in the sense in which a right vested in me is the correlative of a duty imposed upon him. Though I have a liberty or right to go on his land, he has an equal right or liberty to prevent me. The licence has no other effect than to make that lawful which would otherwise be unlawful. The right which I so acquire is nothing more than an extension of the sphere of my rightful activity. So a trustee has a right to receive from the beneficiaries remuneration for his trouble in administering the estate, in the sense that in doing so he does no wrong. But he has no right to receive remuneration, in the sense that the beneficiaries are under any duty to give it to him. So an alien has a right, in the sense of liberty, to enter

British dominions, but the executive government has an equal right, in the same sense, to keep him out (*m*). That I have a right to destroy my property does not mean that it is wrong for other persons to prevent me; it means that it is not wrong for me so to deal with that which is my own. That I have no right to commit theft does not mean that other persons may lawfully prevent me from committing such a crime, but that I myself act illegally in taking property which is not mine (*n*).

§ 76. Powers.

Yet another class of legal rights consists of those which are termed powers. Examples of such are the following: the right to make a will, or to alienate property; the power of sale vested in a mortgagee; a landlord's right of re-entry; the right to marry one's deceased wife's sister; that power of obtaining in one's favour the judgment of a court of law, which is called a right of action; the right to rescind a contract for fraud; a power of appointment; the right of issuing execution on a judgment; the various powers vested in judges and other officials for the due fulfilment of their functions. All these are legal rights—they are legally recognised interests—they are advantages conferred by the law—but they are rights of a different species from the two classes which we have already considered. They resemble liberties, and differ from rights *stricto sensu*, inasmuch as they have no duties corresponding to them. My right to make a will corresponds to no duty in any one else. A mortgagee's power of sale is not the correlative of any duty imposed upon the mortgagor; though it is otherwise with his right to receive payment of the mortgage debt. A debt is not the same thing as a right of action for its recovery. The former is a right in the strict and proper sense, corresponding to the duty of the debtor to pay; the latter is a legal power, corresponding to the liability of the debtor to be sued. That the two are distinct appears from the fact that the right of action may be destroyed (as by prescription) while the debt remains.

(*m*) *Musgrove* v. *Toy*, (1891) A. C. 272.

(*n*) On the distinction between liberties and rights, see Bentham's Works, III. p. 217; *Starey* v. *Graham*, (1899) 1 Q. B. at p. 411, per Channell, J.; *Allen* v. *Flood*, (1898) A. C. at p. 29, per Cave, J.; Terry, p. 90; Brown's Austinian Theory of Law, p. 180.

It is clear, therefore, that a power is not the same thing as a right of the first class. Neither is it identical with a right of the second class, namely, a liberty. That I have a right to make a will does not mean that in doing so I do no wrong. It does not mean that I *may* make a will innocently; it means that I *can* make a will effectively. That I have a right to marry my cousin does not mean that such a marriage is legally innocent, but that it is legally valid. It is not a liberty that I have, but a power. That a landlord has a right of re-entry on his tenant does not mean that in re-entering he does the tenant no wrong, but that by so doing he effectively terminates the lease (*o*).

A power may be defined as ability conferred upon a person by the law to determine, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons. Powers are either public or private. The former are those which are vested in a person as an agent or instrument of the functions of the state; they comprise the various forms of legislative, judicial, and executive authority. Private powers, on the other hand, are those which are vested in persons to be exercised for their own purposes, and not as agents of the state. Power is either ability to determine the legal relations of other persons, or ability to determine one's own. The first of these—power over other persons—is commonly called *authority;* the second—power over oneself—is usually termed *capacity* (*p*).

These, then, are the three chief classes of benefits, privi-

(*o*) A power is usually combined with a liberty to exercise it; that is to say, the exercise of it is not merely effectual but rightful. This, however, is not necessarily the case. It may be effectual and yet wrongful; as when, in breach of my agreement, I revoke a licence given by me to enter upon my land. Such revocation is perfectly effectual, but it is a wrongful act, for which I am liable to the licensee in damages. I had a right (in the sense of power) to revoke the licence, but I had no right (in the sense of liberty) to do so: *Wood* v. *Leadbitter*, 13 M. & W. 838; *Kerrison* v. *Smith*, (1897) 2 Q. B. 445. The fact that since the fusion of law and equity the rule in *Wood* v. *Leadbitter* has little, if any, practical operation (*Hurst* v. *Picture Theatres, Ltd.*, (1915) 1 K. B. 1) does not destroy its significance as an illustration of the distinction between powers and liberties.

(*p*) On the distinction between powers and other kinds of rights, see Windscheid, I. sect. 37; Terry, p. 100.

leges, or rights conferred by the law: liberty, when the law allows to my will a sphere of unrestrained activity; power, when the law actively assists me in making my will effective; right in the strict sense, when the law limits the liberty of others in my behalf. A liberty determines that which I *may* do innocently; a power determines that which I *can* do effectively; a right in the narrow sense determines that which other persons *ought* to do on my behalf. I use my liberties with the acquiescence of the law; I use my powers with its active assistance in making itself the instrument of my will; I enjoy my rights through the control exercised by it over the acts of others on my behalf (*q*), (*r*).

§ 77. Duties, Disabilities, and Liabilities.

There is no generic term which is the correlative of right in the wide sense, and includes all the disadvantages imposed by the law, as a right includes all the benefits conferred by it. These legal disadvantages are of three kinds, being either

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(*q*) This division of rights into rights (*stricto sensu*), liberties, and powers, is not intended to be exhaustive. These are the most important kinds of advantages conferred by the law, but they are not the only kinds. Thus, the term right is sometimes used to mean an *immunity* in relation to the legal power of some other person. The right of a peer to be tried by his peers, for example, is neither a right in the strict sense, nor a liberty, nor a power. It is an exemption from trial by jury—an immunity from the power of the ordinary criminal courts.

(*r*) A very thorough examination of the conception of a legal right is to be found in Terry's Principles of Anglo-American Law (Philadelphia, 1884), a work of theoretical jurisprudence too little known in England, and characterised by much subtle analysis of legal conceptions. Rights are there divided (ch. 6, pp. 84–138) into four kinds, which the author distinguishes as (1) permissive rights (which we have here termed liberties), (2) facultative rights (which we have here termed powers), (3) correspondent rights (which are so called because they correspond to duties, and which we have here termed rights in the strict sense), and (4) protected rights. These last I have not recognised as being in truth a class of rights at all. They are, if I understand Mr. Terry correctly, not rights but the *objects* of rights (*stricto sensu*; for example, life, reputation, liberty, property, domestic relations, &c. That is to say, they are the things in which a person has an interest, and to which, therefore, he has a right, so soon as, but not until, the law protects that interest by imposing duties in respect of it upon other persons. There is no right to reputation apart from and independent of the right that other persons shall not publish defamatory statements. The nature and classification of legal rights has been made the subject of exhaustive and acute analysis by W. N. Hohfeld in (1913) 23 Yale Law Journal 16, and (1917) 26 Yale Law Journal 710. Also by Professor Kocourek in (1921) 30 Yale Law Journal 215 and other articles there referred to and published elsewhere.

Duties, *Disabilities*, or *Liabilities*. A duty is expressible as the absence of a liberty; a disability is the non-possession of a power; a liability is the disadvantage corresponding to either a liberty or a power vested in some one else as against the person liable. Examples of liabilities correlative to liberties are the liability of a trespasser to be forcibly ejected, that of a defaulting tenant to have his goods seized for rent, and that of the owner of a building to have his windows darkened or his foundations weakened by the building or excavations of his neighbours. Examples of liabilities correlative to powers are the liability of a tenant to have his lease determined by re-entry, that of a mortgagor to have the property sold by the mortgagee, that of a judgment debtor to have execution issued against him, and that of an unfaithful wife to be divorced.

The most important form of liability is that which corresponds to the various powers of action and prosecution arising from the different forms of wrongdoing. There is accordingly a narrow sense of the word liability, in which it covers this case exclusively. Liability in this sense is the correlative of a legal remedy. A synonym for it is responsibility. It is either civil or criminal according as it corresponds to a right of action or to a right of prosecution (*s*) (*t*).

SUMMARY.

- The nature of a Wrong.
  - Moral and legal wrongs.
- The nature of a Duty.
  - Moral and legal duties.

(*s*) The distinction here drawn between duty and liability may seem to conflict with the common usage, by which certain kinds of duties are apparently spoken of as liabilities. Thus we say that a man is liable for his debts. This, however, may be construed as meaning that he is liable to be sued for them. We certainly cannot regard liability as a generic term including all kinds of duty. We do not say that a man is liable not to commit murder, or not to defraud other persons.

(*t*) Of the three classes of rights or legal interests which I have considered, the first, consisting of those which are the correlative of duties, are by far the most important. So predominant are they, indeed, that we may regard them as constituting the principal subject-matter of the law, while the others are merely accessory. In future, therefore, I shall use the term right in this narrow and specific sense, except when the context indicates a different usage; and I shall commonly speak of the other forms of rights by their specific designations.

- The nature of a Right.
    - Interests.
    - Their protection by the rule of right.
    - Interests and rights.
    - Moral and legal rights.
        - The denial of moral rights.
- The correlation of rights and duties.
    - No rights without duties.
    - No duties without rights.
- The elements of a legal right.
    - 1. Person entitled, or owner.
    - 2. Person bound.
    - 3. Content.
    - 4. Object or subject-matter.
    - 5. Title.
- No rights without owners.
- No rights without objects.
- Objects of rights
    - 1. Material things.
    - 2. One's own person.
    - 3. Reputation.
    - 4. Domestic relations.
    - 5. Other rights.
    - 6. Immaterial property.
    - 7. Services.
- Rights in the generic sense—Any benefit conferred by the law.
    - 1. Rights (*stricto sensu*)—correlative to Duties.
    - 2. Liberties—correlative to Liabilities.
    - 3. Powers—correlative to Liabilities.

    - 1. Rights (*stricto sensu*)—determining what others *must* do for me.
    - 2. Liberties—determining what I *may* do for myself.
    - 3. Powers—determining what I *can* do as against others.
- Duties, Liabilities, Disabilities.

CHAPTER XI.

THE KINDS OF LEGAL RIGHTS.

§ 78. Perfect and Imperfect Rights.

Recognition by the law in the administration of justice is common to all legal rights and duties, but the purposes and effects of this recognition are different in different cases. All are not recognised to the same end. Hence a division of rights and duties into two kinds, distinguishable as *perfect* and *imperfect*. A perfect right is one which corresponds to a perfect duty; and a perfect duty is one which is not merely recognised by the law, but *enforced*. A duty is enforceable when an action or other legal proceeding, civil or criminal, will lie for the breach of it, and when judgment will be executed against the defendant, if need be, through the physical force of the state (*a*). Enforceability is the general rule. In all ordinary cases, if the law will recognise a right at all, it will not stop short of the last remedy of physical compulsion against him on whom the correlative duty lies. *Ought*, in the mouth of the law, commonly means *must*. In all fully developed legal systems, however, there are rights and duties which, though undoubtedly recognised by the law, yet fall short of this typical and perfect form (*b*).

(*a*) The term enforcement is here used in a wide sense to include the maintenance of a right or duty by any form of compulsory legal process, whether civil or criminal. There is a narrower use of the term, in which it includes only the case of civil proceedings. It is in this sense that I have already defined civil justice as being concerned with the enforcement of rights, and criminal justice as being concerned with the punishment of wrongs. As to the distinction between recognising and enforcing a right, see Dicey, Conflict of Laws, p. 31, 2nd ed.

(*b*) There is another use of the term imperfect duty which pertains to ethics rather than to jurisprudence, and must be distinguished from that adopted in the text. According to many writers, an imperfect duty is one of such a nature that it is not fit for enforcement, but ought properly to be left to the free will of him whose duty it is. A perfect duty, on

Examples of such imperfect legal rights are claims barred by lapse of time; claims unenforceable by action owing to the absence of some special form of legally requisite proof (such as a written document); claims against foreign states or sovereigns, as for interest due on foreign bonds; claims unenforceable by action as exceeding the local limits of a court's jurisdiction, such as claims in respect of foreign land; debts due to an executor from the estate which he administers. In all those cases the duties and correlative rights are imperfect. No action will lie for their maintenance; yet they are, for all that, legal rights and legal duties, for they receive recognition from the law. The statute of limitations, for example, does not provide that after a certain time a debt shall become extinct, but merely that no action shall thereafter be brought for its recovery. Lapse of time, therefore, does not destroy the right, but merely reduces it from the rank of one which is perfect to that of one which is imperfect. It remains valid for all purposes save that of enforcement. In like manner he from whom a chattel is taken wrongfully, and detained for six years, loses all right to sue the taker for its recovery; but he does not cease to be the owner of it. Nor is his ownership merely an empty title; for in divers ways it may lead him, with the assistance of the law, to the possession and enjoyment of his own again. All these cases of imperfect rights are exceptions to the maxim, *Ubi jus ibi remedium*. The customary union between the right and the right of action has been for some special reason severed, but the right survives.

For what purposes the law will recognise an imperfect right is a question relating to the concrete details of a legal system, and cannot be fully discussed here. We may, however, dis-

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the other hand, is one which a man not merely *ought* to perform, but may be *justly compelled* to perform. The duty to give alms to the poor is imperfect; that of paying one's debts is perfect. Perfect duties pertain to the sphere of justice; imperfect to that of benevolence. The distinction is not equivalent to that between legal duties and those which are merely moral. A duty may be a perfect duty of justice, although the actual legal system takes no notice of it; and conversely an imperfect duty of benevolence may be unjustly made by law the subject of compulsion. It does not seem possible, however, so to divide the sphere of duty by a hard and fast line. See § 19, *supra*.

tinguish the following effects as those of greatest importance and most general application.

1. An imperfect right may be good as a ground of defence, though not as a ground of action. I cannot sue on an informal contract, but if money is paid or property delivered to me in pursuance of it, I can successfully defend any claim for its recovery.

2. An imperfect right is sufficient to support any security that has been given for it. A mortgage or pledge remains perfectly valid, although the debt secured by it has ceased to be recoverable by action (*c*). But if the debt is discharged, instead of becoming merely imperfect, the security will disappear along with it.

3. An imperfect right may possess the capacity of becoming perfect. The right of action may not be non-existent, but may be merely dormant. An informal verbal contract may become enforceable by action, by reason of the fact that written evidence of it has since come into existence. In like manner part-payment or acknowledgment will raise once more to the level of a perfect right a debt that has been barred by the lapse of time.

§ 79. The Legal Nature of Rights against the State.

A subject may claim rights against the state, no less than against another subject. He can institute proceedings against the state for the determination and recognition of those rights in due course of law, and he can obtain judgment in his favour, recognising their existence or awarding to him compensation for their infringement. But there can be no *enforcement* of that judgment. What duties the state recognises as owing by it to its subjects, it fulfils of its own free will and at its unconstrained good pleasure. The strength of the law is none other than the strength of the state, and cannot be turned or used against the state whose strength it is. The rights of the subject against the state are therefore imperfect. They obtain legal recognition but no legal enforcement.

(*c*) *Ex parte Sheil*, 4 Ch. D. 789; *London & Midland Bank* v. *Mitchell*, (1899) 2 Ch. 161.

The fact that the element of enforcement is thus absent in the case of rights against the state, has induced many writers to deny that these are legal rights at all. But as we have already seen, we need not so narrowly define the term legal right, as to include only those claims that are legally enforced. It is equally logical and more convenient to include within the term all those claims that are legally recognised in the administration of justice. All rights against the state are not legal, any more than all rights against private persons are legal. But some of them are; those, namely, which can be sued for in courts of justice, and the existence and limits of which will be judicially determined in accordance with fixed principles of law, redress or compensation being awarded for any violation of them. To hold the contrary, and to deny the name of legal right or duty in all cases in which the state is the defendant, is to enter upon a grave conflict with legal and popular speech and thought. In the language of lawyers, as in that of laymen, a contract with the state is as much a source of legal rights and obligations, as is a contract between two private persons; and the right of the holder of consols is as much a legal right, as is that of a debenture holder in a public company. It is not to the point to say that rights against the state are held at the state's good pleasure, and are therefore not legal rights at all; for all other legal rights are in the same position. They are legal rights not because the state is bound to recognise them, but because it does so.

Whether rights against the state can properly be termed legal depends simply on whether judicial proceedings in which the state is the defendant are properly included within the administration of justice. For if they are rightly so included, the principles by which they are governed are true principles of law, in accordance with the definition of law, and the rights defined by these legal principles are true legal rights. The boundary-line of the administration of justice has been traced in a previous chapter. We there saw sufficient reason for including not only the direct enforcement of justice, but all other judicial functions exercised by courts of justice. This is the ordinary use of the term, and it seems open to no logical objection (*d*).

§ 80. Positive and Negative Rights.

In respect of their contents, rights are of two kinds, being either *positive* or *negative*. A positive right corresponds to a positive duty, and is a right that he on whom the duty lies shall do some positive act on behalf of the person entitled. A negative right corresponds to a negative duty, and is a right that the person bound shall refrain from some act which would operate to the prejudice of the person entitled. The same distinction exists in the case of wrongs. A positive wrong or wrong of commission is the breach of a negative duty and the violation of a negative right. A negative wrong or wrong of omission is the breach of a positive duty, and the infringement of a positive right. A negative right entitles the owner of it to the maintenance of the present position of things; a positive right entitles him to an alteration of this position for his advantage. The former is merely a right not to be harmed; the latter is a right to be positively benefited. The former is a right to retain what one already has; the latter is a right to receive something more than one already has.

In the case of a negative right the interest which is its *de facto* basis is of such a nature that it requires for its adequate maintenance or protection nothing more than the passive acquiescence of other persons. All that is asked by the owner of the interest is to be left alone in the enjoyment of it. In the case of a positive right, on the other hand, the interest is of a less perfect and self-sufficient nature, inasmuch as the person entitled requires for the realisation and enjoyment of his right the active assistance of other persons. In the former case I stand in an immediate and direct relation to the object of my right, and claim from others nothing more than that they shall not interfere between me and it. In the latter case I stand in a mediate and indirect relation to the object, so that I can attain to it only through the active help of others. My

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(*d*) As to rights against the state, see Brown's Austinian Theory of Law, p. 194.

right to the money in my pocket is an example of the first class; my right to the money due to me from my debtor is an instance of the second.

The distinction is one of practical importance. It is much easier, as well as much more necessary, for the law to prevent the infliction of harm than to enforce positive beneficence. Therefore while liability for hurtful acts of commission is the general rule, liability for acts of omission is the exception. Generally speaking, all men are bound to refrain from all kinds of positive harm, while only some men are bound in some ways actively to confer benefits on others. No one is entitled to do another any manner of hurt, save with special ground of justification; but no one is bound to do another any manner of good save on special grounds of obligation. Every man has a right against every man that the present position of things shall not be interfered with to his detriment; whilst it is only in particular cases and for special reasons that any man has a right against any man that the present position shall be altered for his advantage. I have a right against every one not to be pushed into the water; if I have a right at all to be pulled out, it is only on special grounds against determinate individuals

§ 81. Real and Personal Rights.

The distinction between real and personal rights is closely connected but not identical with that between negative and positive rights. It is based on a difference in the incidence of the correlative duties. A real right corresponds to a duty imposed upon persons in general; a personal right corresponds to a duty imposed upon determinate individuals. A real right is available against the world at large; a personal right is available only against particular persons. The distinction is one of great prominence in the law, and we may take the following as illustrations of it. My right to the peaceable occupation of my farm is a real right, for all the world is under a duty towards me not to interfere with it. But if I grant a lease of the farm to a tenant, my right to receive the rent from him is personal, for it avails exclusively against the tenant himself. For the same reason my right to the possession and use of the money in my purse is real; but my right to receive money from some one who owes it to me is personal. I have a real right against every one not to be deprived of my liberty or my reputation; I have a personal right to receive compensation from any individual person who has imprisoned or defamed me. I have a real right to the use and occupation of my own house; I have a personal right to receive accommodation at an inn.

A real right, then, is an interest protected against the world at large; a personal right is an interest protected solely against determinate individuals. The distinction is clearly one of importance. The law confers upon me a greater advantage in protecting my interests against all persons than in protecting them only against one or two. The right of a patentee, who has a monopoly as against all the world, is much more valuable than the right of him who purchases the good-will of a business and is protected only against the competition of his vendor. If I buy a chattel, it is an important question whether my interest in it is forthwith protected against every one, or only against him who sells it to me. The main purpose of mortgages and other forms of real security is to supplement the imperfections of a personal right by the superior advantages inherent in a right of the other class. Furthermore, these two kinds of rights are necessarily very different in respect of the modes of their creation and extinction. The indeterminate incidence of the duty which corresponds to a real right, renders impossible many modes of dealing with it which are of importance in the case of personal rights.

The distinction which we are now considering is closely connected with that between positive and negative rights. All real rights are negative, and most personal rights are positive, though in a few exceptional cases they are negative. It is not difficult to see the reason for this complete or partial coincidence. A real right, available against all other persons, can be nothing more than a right to be left alone by those persons—a right to their passive non-interference. No person can have a legal right to the active assistance of all the world.

The only duties, therefore, that can be of general incidence are negative. It may be objected to this, that though a private person cannot have a positive right against all other persons, yet the state may have such a right against all its subjects. All persons, for example, may be bound to pay a tax or to send in census returns. Are not these duties of general incidence, and yet positive? The truth is, however, that the right of the state in all such cases is personal and not real. The right to receive a tax is not one right, but as many separate rights as there are taxpayers. If I owe ten pounds to the state as income tax, the right of the state against me is just as personal as is that of any other creditor, and it does not change its nature because other persons or even all my fellow-citizens owe a similar amount on the like account. My debt is not theirs, nor are their debts mine. The state has not one real right available against all, but an immense number of personal rights, each of which avails against a determinate taxpayer. On the other hand, the right of the state that no person shall trespass on a piece of Crown land, is a single interest protected against all the world, and is therefore a single real right. The unity of a real right consists in the singleness of its subject-matter. The right of reputation is *one* right, corresponding to an infinite number of duties; for the subject-matter is one thing, belonging to one person, and protected against all the world.

Although all real rights are negative, it is not equally true that all personal rights are positive. This is so, indeed, in the great majority of cases. The merely passive duty of non-interference, when it exists at all, usually binds all persons in common. There are, however, exceptional cases in which this is not so. These exceptional rights which are both negative and personal, are usually the product of some agreement by which some particular individual has deprived himself of a liberty which is common to all other persons. Thus all tradesmen may lawfully compete with each other in the ordinary way of business, even though the result of this competition is the ruin of the weaker competitors. But in selling to another the good-will of my business I may lawfully deprive myself of this liberty by an express agreement with the purchaser to that effect. He thereby acquires against me a right of exemption from competition, and this right is both personal and negative. It is a monopoly, protected, not against the world at large, but against a determinate individual. Such rights belong to an intermediate class of small extent, standing between rights which are both real and negative, on the one side, and those which are both personal and positive, on the other.

In defining a real right as one availing against the world at large, it is not meant that the incidence of the correlative duty is absolutely universal, but merely that the duty binds persons in general, and that if any one is not bound his case is exceptional. Similarly a personal right is not one available against a single person only, but one available against one or more *determinate* individuals. The right of the creditor of a firm is personal, though the debt may be due from any number of partners. Even as so explained, however, it can scarcely be denied, that if intended as an exhaustive classification of all possible cases, the distinction between real and personal rights—between duties of general and of determinate incidence—is logically defective. It takes no account of the possibility of a third and intermediate class. Why should there not be rights available against particular classes of persons, as opposed both to the whole community and to persons individually determined, for example, a right available only against aliens? An examination, however, of the contents of any actual legal system will reveal the fact that duties of this suggested description either do not exist at all, or are so exceptional that we are justified in classing them as anomalous. As a classification, therefore, of the rights which actually obtain legal recognition, the distinction between real and personal rights may be accepted as valid.

The distinction between a real and a personal right is otherwise expressed by the terms right *in rem* (or *in re*) and right *in personam*. These expressions are derived from the commentators on the civil and canon law. Literally interpreted, *jus in rem* means a right against or in respect of a thing, *jus in personam*, a right against or in respect of a person. In truth, however, every right is at the same time one in respect of some thing, namely, its object, and against some person, namely, the person bound. In other words, every right involves, not only a *real*, but also a *personal* relation. Yet, although these two relations are necessarily co-existent, their relative prominence and importance are not always the same. In real rights it is the real relation that stands in the forefront of the juridical conception; such rights are emphatically and conspicuously *in rem*. In personal rights, on the other hand, it is the personal relation that forms the predominant factor in the conception; such rights are before all things *in personam*. For this difference there is more than one reason. In the first place, the real right is a relation between the owner and a vague multitude of persons, no one of whom is distinguished from any other; while a personal right is a definite relation between determinate individuals, and the definiteness of this personal relation raises it into prominence. Secondly, the source or title of a real right is commonly to be found in the character of the real relation, while a personal right generally derives its origin from the personal relation. In other words, if the law confers upon me a real right, it is commonly because I stand in some special relation to the thing which is the object of the right. If, on the contrary, if confers on me a personal right, it is commonly because I stand in some special relation to the person who is the subject of the correlative duty. If I have a real right in a material object, it is because I made it, or found it, or first acquired possession of it, or because by transfer or otherwise I have taken the place of some one who did originally stand in some such relation to it. But if I have a personal right to receive money from another, it is commonly because I have made a contract with him, or have come in some other manner to stand in a special relation to him. Each of these reasons tends to advance the importance of the real relation in real rights, and that of the personal relation in personal rights. The former are primarily and pre-eminently *in rem*, the latter primarily and pre-eminently *in personam*.

The commonest and most important kind of *jus in personam* is that which has been termed by the civilians and canonists *jus ad rem*. I have a *jus ad rem* when I have a right that some other right shall be transferred to me or otherwise vested in me. *Jus ad rem* is a right to a right. We have already seen, in the previous chapter, that it is possible for one right to be in this way the subject-matter of another. A debt, a contract to assign property, and a promise of marriage, are examples of this. It is clear that such a right to a right must be in all cases *in personam*. The right which is to be transferred, however—the subject-matter of the *jus ad rem*—may be either real or personal, though it is more commonly real. I may agree to assign or mortgage a debt or the benefit of a contract, no less than lands or chattels. An agreement to assign a chattel creates a *jus ad jus in rem*; an agreement to assign a debt or a contract creates a *jus ad jus in personam* (*e*).

The terms *jus in rem* and *jus in personam* were invented by the commentators on the civil law, and are not found in the original sources. The distinction thereby expressed, however, received adequate recognition from the Roman lawyers. They drew a broad line of demarcation between *dominium* on the one side and *obligatio* on the other, the former including real, and the latter personal rights. *Dominium* is the relation between the owner of a real right (*dominus*) and the right so vested in him. *Obligatio* is the relation between the owner of a personal right (*creditor*) and the person on whom the correlative duty lies. *Obligatio*, in other words, is the legal bond by which two or more determinate individuals are bound together. Our modern English obligation has lost this specific meaning, and is applied to any duty, whether it corresponds to a real or to a personal right. It is to be noticed, however, that both *dominium* and *obligatio* are limited by the Romans to the sphere of what, in the succeeding part of this chapter, we term proprietary rights. A man's right to his personal liberty or reputation, for example, falls neither within the sphere of *dominium* nor within that of *obligatio*. The distinction between real and personal rights, on the other hand, is subject to no such limitation.

The terms *jus in rem* and *jus in personam* are derived from the Roman terms *actio in rem* and *actio in personam*. An *actio in rem* was an action for the recovery of *dominium*; one in which the plaintiff claimed that a certain thing belonged to him and ought to be restored or given up to him. An *actio in personam* was one for the enforcement of an *obligatio*; one in which the plaintiff claimed the payment of money, the performance of a contract, or the protection of some other personal right vested in him as against the defen-

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(*e*) Some writers treat *jus in personam* and *jus ad rem* as synonymous terms. It seems better, however, to use the latter in a narrower sense, as including merely one species, although the most important species, *of jura in personam*. Savigny, System, sect. 56, n. b.

dant (*f*). Naturally enough, the right protected by an *actio in rem* came to be called *jus in rem*, and a right protected by an *actio in personam, jus in personam.*

§ 82. Proprietary and Personal Rights.

Another important distinction is that between proprietary and personal rights. The aggregate of a man's proprietary rights constitutes his *estate*, his *assets*, or his *property* in one of the many senses of that most equivocal of legal terms. German jurisprudence is superior to our own in possessing a distinct technical term for this aggregate of proprietary rights, namely, *Vermögen*, the rights themselves being *Vermögensrechte*. The French speak in the same fashion of *avoir* or *patrimoine*. The sum total of a man's personal rights, on the other hand, constitutes his *status* or personal condition, as opposed to his estate. If he owns land, or chattels, or patent rights, or the good-will of a business, or shares in a company, or if debts are owing to him, all these rights pertain to his estate. But if he is a free man and a citizen, a husband and a father, the rights which he has as such pertain to his status or standing in the law (*g*).

What, then, is the essential nature of this distinction? It lies in the fact that proprietary rights are *valuable*, and personal rights are not. The former are those which are worth money; the latter are those that are worth none. The former are the elements of a man's *wealth*; the latter are merely elements in his *well-being*. The former possess, not merely juridical, but also economic significance; while the latter possess juridical significance only (*h*).

(*f*) Gaius, IV. 2.

(*g*) A personal as opposed to a proprietary right is not to be confounded with a personal as opposed to a real right. It is a misfortune of our legal nomenclature that it is necessary to use the word personal in several different senses. The context, however, should in all cases be sufficient to indicate the particular signification intended. The more flexible language of the Germans enables them to distinguish between *persönliche Rechte* (as opposed to *dingliche Rechte* or real rights) and *Personenrechte* (as opposed to *Vermögensrechte* or proprietary rights). See Dernburg, Pandekten, I. sect. 22, note 7.

(*h*) Ahrens, sect. 55: Tous les biens, soit matériels en eux-mêmes, soit susceptibles d'être estimés en argent comme équivalent (par aestimatio et

It makes no difference in this respect whether a right is *jus in rem* or *jus in personam*. Rights of either sort are proprietary, and make up the estate of the possessor if they are of economic value. Thus my right to the money in my pocket is proprietary; but not less so is my right to the money which I have in the bank. Stock in the funds is part of a man's estate, just as much as land and houses; and a valuable contract, just as much as a valuable chattel. On the other hand, a man's rights of personal liberty, and of reputation, and of freedom from bodily harm, are personal, not proprietary. They concern his welfare, not his wealth; they are juridical merely, not also economic. So, also, with the rights of a husband and father with respect to his wife and children. Rights such as these constitute his legal status, not his legal estate. If we go outside the sphere of private into that of public law, we find the list of personal rights greatly increased. Citizenship, honours, dignities, and official position in all its innumerable forms, pertain to the law of status, not to that of property (*i*).

With respect to the distinction between proprietary and personal rights—estate and status—there are the following supplementary observations to be made:—

1. The distinction is not confined to rights in the strict sense, but is equally applicable to other classes of rights also. A person's estate is made up not merely of his valuable claims against other persons, but of such of his powers and liberties, as are either valuable in themselves, or are accessory to other rights which are valuable. A landlord's right of re-entry is proprietary, no less than his ownership of the land; and a mortgagee's right of sale, no less than the debt

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condemnatio pecuniaria) appartenant à une personne, forment son avoir ou son patrimoine.

Baudry-Lacantinerie, Des Biens, sect. 2: Le patrimoine est un ensemble de droits et de charges appréciables en argent.

Dernburg, Pandekten, I. sect. 22: Vermögen ist die Gesammtheit der geldwerthen Rechte einer Person.

Windscheid, I. sect. 42, note: Vermögensrechte sind die Rechte von wirthschaftlichem Werth.

See also to the same effect Savigny, System, sect. 56, and Puchta, Institutionen, II. sect. 193.

(*i*) The words status and estate are in their origin the same. As to the process of their differentiation in legal meaning, see Pollock and Maitland, History of English Law, II. pp. 10 and 78 (1st ed.). The other uses of the term property will be considered later, in chapter xx.

secured. A general power of appointment is proprietary, but the power of making a will or a contract is personal.

2. The distinction between personal and proprietary rights has its counterpart in that between personal and proprietary duties and liabilities. The latter are those which relate to a person's estate, and diminish the value of it. They represent a loss of money, just as a proprietary right represents the acquisition of it. All others are personal. A liability to be sued for a debt is proprietary, but a liability to be prosecuted for a crime is personal. The duty of fulfilling a contract for the purchase of goods is proprietary, but the duty of fulfilling a contract to marry is personal.

3. Although the term estate includes only rights (in the generic sense), the term status includes not only rights, but also duties, liabilities, and disabilities. A minor's contractual disabilities are part of his status, though a man's debts are not part of his estate. Status is the sum of one's personal duties, liabilities, and disabilities, as well as of one's personal rights.

4. A person's status is made up of smaller groups of personal rights, duties, liabilities, and disabilities, and each of these constituent groups is itself called a status. Thus the same person may have at the same time the status of a free man, of a citizen, of a husband, of a father, and so on. So we speak of the status of a wife, meaning all the personal benefits and burdens of which marriage is the legal source and title in a woman. In the same way we speak of the status of an alien, a lunatic, or an infant.

5. It may be thought that proprietary rights should be defined as those which are transferable, rather than as those which are valuable. As to this, it seems clear that all transferable rights are also proprietary; for if they can be transferred, they can be sold, and are therefore worth money. But it is not equally true that all proprietary rights are transferable. Popular speech does not, and legal theory need not, deny the name of property to a valuable right, merely because it is not transferable. A pension may be inalienable; but it must be counted, for all that, as wealth or property. Debts were originally incapable of assignment; but even then they were elements of the creditor's estate. A married woman may be unable to alienate her estate; but it is an estate none the less. The true test of a proprietary right is not whether it can be alienated, but whether it is equivalent to money; and it may be equivalent to money, though it cannot be sold for a price. A right to receive money or something which can itself be turned into money, is a proprietary right, and is to be reckoned in the possessor's estate, even though inalienable.

6. It is an unfortunate circumstance that the term status is used in a considerable variety of different senses. Of these we may distinguish the following:—

(a) *Legal condition of any kind, whether personal or proprietary.*

This is the most comprehensive use of the term. A man's status in this sense includes his whole position in the law—the sum total of his legal rights, duties, liabilities, or other legal relations, whether proprietary or personal, or any particular group of them separately considered. Thus we may speak of the status of a landowner, of a trustee, of an executor, of a solicitor, and so on. It is much more common, however, to confine the term in question to some particular description of legal condition—some particular kind of status in this wide sense. Hence the other and specific meanings of the term.

(b) *Personal legal condition;* that is to say, a man's legal condition, only so far as his personal rights and burdens are concerned, to the exclusion of his proprietary relations. It is in this sense that we have hitherto used the term. Thus we speak of the status of an infant, of a married woman, of a father, of a public official, or of a citizen; but not of a landowner or of a trustee.

(c) *Personal capacities and incapacities*, as opposed to the other elements of personal status. By certain writers the term status is applied not to the whole sphere of personal condition, but only to one part of it, namely that which relates to personal capacity and incapacity (*k*). The law of status in this sense would include the rules as to the contractual capacities and incapacities of married women, but not the personal rights and duties existing between her and her husband. So it would include the law as to an infant's contracts, but not the law as to the mutual rights of parent and child. This law of status in the sense of personal capacity is considered as a special branch of the law, introductory to the main body of legal doctrine, on the ground that a knowledge of the different capacities of different classes of persons to acquire rights and to enter into legal relations is pre-supposed in the exposition of those rights and legal relations themselves. It cannot be doubted that there are certain rules which so permeate the law, that it is necessary in any well-arranged system to dispose of them once for all in a preliminary portion of the code, instead of constantly repeating them in connexion with every department of the law in which they are relevant; but it may be doubted whether the rules of personal capacity belong to this category. Surely the contractual capacity of a minor is best dealt with in the law of contracts, his capacity to commit a tort in the law of tort, his capacity to commit a crime in the

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(*k*) See Dicey, Conflict of Laws, p. 509, 4th ed.

criminal law, his capacity to marry in the law of marriage. Moreover, even if personal capacity is a suitable subject for separate and introductory treatment in the law, there seems little justification for confining the term status to this particular branch of personal condition.

(d) *Compulsory as opposed to conventional personal condition.* Status is used by some writers to signify a man's personal legal condition, so far only as it is imposed upon him by the law without his own consent, as opposed to the condition which he has acquired for himself by agreement. The position of a slave is a matter of status, the position of a free servant is a matter of contract. Marriage creates a status in this sense, for although it is entered into by way of consent, it cannot be dissolved in that way, and the legal condition created by it is determined by the law, and cannot be modified by the agreement of the parties. A business partnership, on the other hand, pertains to the law of contract, and not to that of status (*l*).

7. *The law of persons and the law of things.* Certain of the Roman lawyers, for example Gaius, divided the whole of the substantive law into two parts, which they distinguished as *jus quod ad personas pertinet* and *jus quod ad res pertinet*, terms which are commonly translated as the law of persons and the law of things. There has been much discussion as to the precise significance of this distinction, and it is possible that it was based on no clear and consistent logical analysis at all. Any adequate investigation of the matter would here be out of place, but it is suggested that the true basis of the division is the distinction between personal and proprietary rights, between status and property. The *jus quod ad res pertinet* is the law of property, the law of proprietary rights; the *jus quod ad personas pertinet* is the law of status, the law of personal rights, so far as such rights require separate consideration, instead of being dealt with in connexion with those portions of the law of property to which they are immediately related (*m*).

§ 83. Rights in re propria and Rights in re aliena.

Rights may be divided into two kinds, distinguished by the civilians as *jura in re propria* and *jura in re aliena*. The latter may also be conveniently termed *encumbrances*, if we use that term in its widest permissible sense (*n*). A right *in*

(*l*) See Maine's Ancient Law, Ch. 5 ad fin.; Markby's Elements of Law, § 178; Hunter's Roman Law, p. 138, 3rd ed.

(*m*) See Savigny, System, § 59.

(*n*) The Romans termed them *servitutes*, but the English term servitude *re aliena* or encumbrance is one which limits or derogates from some more general right belonging to some other person in respect of the same subject-matter. All others are *jura in re propria.* It frequently happens that a right vested in one person becomes subject or subordinate to an adverse right vested in another. It no longer possesses its full scope or normal compass, part of it being cut off to make room for the limiting and superior right which thus derogates from it. Thus the right of a landowner may be subject to, and limited by, that of a tenant to the temporary use of the property; or to the right of a mortgagee to sell or take possession; or to the right of a neighbouring landowner to the use of a way or other easement; or to the right of the vendor of land in respect of restrictive covenants entered into by the purchaser as to the use of it; for example, a covenant not to build upon it.

A right subject to an encumbrance may be conveniently designated as *servient*, while the encumbrance which derogates from it may be contrasted as *dominant.* These expressions are derived from, and conform to, Roman usage in the matter of servitudes. The general and subordinate right was spoken of figuratively by the Roman lawyers as being in bondage to the special right which prevailed over and derogated from it. The term *servitus*, thus derived, came to denote the superior right itself rather than the relation between it and the other; just as *obligatio* came to denote the right of the creditor, rather than the bond of legal subjection under which the debtor lay (*o*).

The terms *jus in re propria* and *jus in re aliena* were devised by the commentators on the civil law, and are not to be found in the original sources. Their significance is clear. The owner of a chattel has *jus in re propria*—a right over his own property; the pledgee or other encumbrancer of it has *jus in re aliena*—a right over the property of someone else.

There is nothing to prevent one encumbrance from being itself subject to another. Thus a tenant may sublet; that

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is used to include one class of *jura in re aliena* only, namely the *servitutes praediorum* of Roman law.

(*o*) The owner of an encumbrance may be termed the encumbrancer of the servient right or property over which it exists.

is to say, he may grant a lease of his lease, and so confer upon the sub-lessee a *jus in re aliena* of which the immediate subject-matter is itself merely another right of the same quality. The right of the tenant in such a case is dominant with regard to that of the landowner, but servient with regard to that of the sub-lessee. So the mortgagee of land may grant a mortgage of his mortgage; that is to say, he may create what is called a sub-mortgage. The mortgage will then be a dominant right in respect of the ownership of the land, but a servient right with respect to the sub-mortgage. So the easements appurtenant to land are leased or mortgaged along with it; and therefore, though themselves encumbrances, they are themselves encumbered. Such a series of rights, each limiting and derogating from the one before it, may in theory extend to any length.

A right is not to be classed as encumbered or servient merely on account of its *natural* limits and restrictions. Otherwise all rights would fall within this category, since none of them are unlimited in their scope, all being restrained within definite boundaries by the conflicting rights of other persons. All ownership of material things, for example, is limited by the maxim, *sic utere tuo ut alienum non laedas*. Every man must so restrain himself in the use of his property, as not to infringe upon the property and rights of others. The law confers no property in stones sufficiently absolute and unlimited to justify their owner in throwing them through his neighbour's windows. No landowner may, by reason of his ownership, inflict a nuisance upon the public or upon adjoining proprietors. But in these and all similar cases we are dealing merely with the normal and natural boundaries of the right, not with those exceptional and artificial restrictions which are due to the existence of *jura in re aliena* vested in other persons. A servient right is not merely a limited right, for all are limited; it is a right so limited that its ordinary boundaries are infringed. It is a right which, owing to the influence of some other and superior right, is prevented from attaining its normal scope and dimensions. Until we have first settled the natural contents and limits of a right, there can be no talk of other rights which qualify and derogate from it.

It is essential to an encumbrance that it should, in the technical language of our law, *run with* the right encumbered by it. In other words, the dominant and the servient rights are necessarily *concurrent*. By this it is meant that an encumbrance must follow the encumbered right into the hands of new owners, so that a change of ownership will not free the right from the burden imposed upon it. If this is not so—if the right is transferable free from the burden—there is no true encumbrance. For the burden is then merely personal to him who is subject to it, and does not in truth limit or derogate from the right itself. This right still exists in its full compass, since it can be transferred in its entirety to a new owner. For this reason an agreement to sell land vests an encumbrance or *jus in re aliena* in the purchaser; but an agreement to sell a chattel does not. The former agreement runs with the property, while the latter is non-concurrent. So the fee simple of land may be encumbered by negative agreements, such as a covenant not to build; for, speaking generally, such obligations will run with the land into the hands of successive owners. But positive covenants are merely personal to the covenantor, and derogate in no way from the fee simple vested in him, which he can convey to another free from any such burdens.

Concurrence, however, may exist in different degrees; it may be more or less perfect or absolute. The encumbrance may run with the servient right into the hands of some of the successive owners and not into the hands of others. In particular, encumbrances may be concurrent either in law or merely in equity. In the latter case the concurrence is imperfect or partial, since it does not prevail against the kind of owner known in the language of the law as a purchaser for value without notice of the dominant right. Examples of encumbrances running with their servient rights at law are easements, leases, and legal mortgages. On the other hand, an agreement for a lease, an equitable mortgage, a restrictive covenant as to the use of land, and a trust, will run with their respective servient rights in equity, but not at law.

It must be carefully noted that the distinction between *jura in re propria* and *jura in re aliena* is not confined to the sphere of real rights or *jura in rem*. Personal, no less than real rights, may be encumbrances of other rights. Personal, no less than real rights, may be themselves encumbered. A debtor, for example, may grant a security over the book debts owing to him in his business, or over his shares in a company, as well as over his stock in trade. A life tenancy of money in the public funds is just as possible as a life tenancy of land. There can be a lien over a man's share in a trust fund, as well as over a chattel belonging to him. The true test of an encumbrance is not whether the encumbrancer has a *jus in rem* available against all the world, but whether he has a right which will avail against subsequent owners of the encumbered property.

The chief classes of encumbrances are four in number, namely, Leases, Servitudes, Securities, and Trusts. In a later chapter we shall consider these more at length, and in the meantime it is sufficient briefly to indicate their nature.

1. A lease is the encumbrance of property vested in one man by a right to the possession and use of it vested in another.
2. A servitude is a right to the limited use of a piece of land unaccompanied either by the ownership or by the possession of it; for example, a right of way or a right to the passage of light or water across adjoining land.
3. A security is an encumbrance vested in a creditor over the property of his debtor, for the purpose of securing the recovery of the debt; a right, for example, to retain possession of a chattel until the debt is paid.
4. A trust is an encumbrance in which the ownership of property is limited by an equitable obligation to deal with it for the benefit of some one else. The owner of the encumbered property is the trustee; the owner of the encumbrance is the beneficiary.

§ 84. Principal and Accessory Rights.

The relation between principal and accessory rights is the reverse of that just considered as existing between servient and dominant rights. For every right is capable of being affected to any extent by the existence of other rights; and the influence thus exercised by one upon another is of two kinds, being either adverse or beneficial. It is adverse when one right is limited or qualified by another vested in a different owner. This is the case already dealt with by us. It is beneficial, on the other hand, when one right has added to it a supplementary right vested in the same owner. In this case the right so augmented may be termed the *principal*, while the one so appurtenant to it is the *accessory* right. Thus a security is accessory to the right secured; a servitude is accessory to the ownership of the land for whose benefit it exists; the rent and covenants of a lease are accessory to the landlord's ownership of the property; covenants for title in a conveyance are accessory to the estate conveyed; and a right of action is accessory to the right for whose enforcement it is provided.

A real right may be accessory to a personal, as in the case of a debt secured by a mortgage of land. A personal right may be accessory to a real, as in the case of the covenants of a lease. A real right may be accessory to a real, as in the case of servitudes appurtenant to land; and finally, a personal right may be accessory to a personal, as in the case of a debt secured by a guarantee.

A right which is dominant with respect to one right, is often at the same time accessory with respect to another. It limits one right, and at the same time augments another. A typical example is a servitude over land. The owner of Whiteacre has a right of way over the adjoining farm, Blackacre, to the highway. This right of way is dominant with respect to Blackacre, and accessory with respect to Whiteacre; for the burden of it goes with Blackacre, and the benefit of it with Whiteacre. Blackacre is accordingly called the servient, and Whiteacre the dominant tenement. So a mortgage is a dominant right with respect to the property subject to it, and an accessory right with respect to the debt secured by it. In like manner a landlord's right to his rent is dominant with regard to the lease, but accessory with regard to the reversion. This double character, however, is not necessary or universal. A public right of way is an encumbrance of the land subject to it, but it is not accessory to any other land. So a lease is a dominant right which is not at the same time accessory to any principal.

§ 85. Legal and Equitable Rights.

In a former chapter we considered the distinction between common law and equity. We saw that these two systems of law, administered respectively in the courts of common law and the Court of Chancery, were to a considerable extent discordant. One of the results of this discordance was the establishment of a distinction between two classes of rights, distinguishable as legal and equitable. Legal rights are those which were recognised by the courts of common law. Equitable rights (otherwise called equities) are those which were recognised solely in the Court of Chancery. Notwithstanding the fusion of law and equity by the Judicature Act, 1873, this distinction still exists, and must be reckoned with as an inherent part of our legal system. That which would have been merely an equitable right before the Judicature Act is merely an equitable right still.

Inasmuch as all rights, whether legal or equitable, now obtain legal recognition in all courts, it may be suggested that the distinction is now of no importance. This is not so, however, for in two respects at least, these two classes of rights differ in their practical effects.

1. The methods of their creation and disposition are different. A legal mortgage of land must be created by deed, but an equitable mortgage may be created by a written agreement or by a mere deposit of title-deeds. A similar distinction exists between a legal and an equitable lease, a legal and an equitable servitude, a legal and an equitable charge on land, and so on.

2. Equitable rights have a more precarious existence than legal rights. Where there are two inconsistent legal rights claimed adversely by different persons over the same thing, the first in time prevails. *Qui prior est tempore potior est jure.* A similar rule applies to the competition of two inconsistent

equitable rights. But when a legal and an equitable right conflict, the legal will prevail over and destroy the equitable, even though subsequent to it in origin, provided that the owner of the legal right acquired it for value and without notice of the prior equity. As between a prior equitable mortgage, for example, and a subsequent legal mortgage, preference will be given to the latter. The maxim is: Where there are equal equities, the law will prevail. This liability to destruction by conflict with a subsequent legal right is an essential feature and a characteristic defect of all rights which are merely equitable (*p*).

SUMMARY.

- I. Rights
  - Perfect—enforceable by law.
  - Imperfect—recognised by law, but not enforceable.
  - The legal quality of rights against the state.
- II. Rights
  - Positive—correlative to positive duties and negative wrongs.
  - Negative—correlative to negative duties and positive wrongs.
- III. Rights
  - Real—*in rem* or *in re*—correlative to duties of indeterminate incidence (all negative).
  - Personal—*in personam*—correlative to duties of determinate incidence (almost all positive).
    - *Jura ad rem.*
    - *Dominium* and *obligatio.*
- IV. Rights
  - Proprietary—constituting a person's *estate* or property.
  - Personal—constituting a person's *status* or personal condition.
  - Other uses of the term *status.*
- V. Rights
  - *In re propria.*
  - *In re aliena—servitus*—encumbrance.
  - The natural limits of rights, distinguished from encumbrances.
  - The concurrence of the encumbrance and the right encumbered.

(*p*) In addition to the distinctions between different kinds of rights considered in this chapter, there must be borne in mind the important distinction between Primary and Sanctioning Rights, but this has already been sufficiently dealt with in the chapter on the Administration of Justice.

Encumbrances either real or personal rights.

Classes of encumbrances
- 1. Leases.
- 2. Servitudes.
- 3. Securities.
- 4. Trusts.

VI. Principal and Accessory Rights.
VII. Legal and Equitable Rights.
VIII. Primary and Sanctioning Rights.

CHAPTER XII.

OWNERSHIP.

§ 86. The Definition of Ownership.

Ownership, in its most comprehensive signification, denotes the relation between a person and any right that is vested in him. That which a man owns is in all cases a right. When, as is often the case, we speak of the ownership of a material object, this is merely a convenient figure of speech. To own a piece of land means in truth to own a particular kind of right with respect to the land, namely, the fee simple of it.

Ownership, in this generic sense, extends to all classes of rights, whether proprietary or personal, *in rem* or *in personam*, *in re propria* or *in re aliena*. I may own a debt, or a mortgage, or a share in a company, or money in the public funds, or a copyright, or a lease, or a right of way, or the fee simple of land. Every right is owned; and nothing can in this generic sense be owned except a right. Every man is the owner of the rights which are his.

Ownership, in its generic sense, as the relation in which a person stands to any right vested in him, is opposed to two other possible relations between a person and a right. It is opposed, in the first place, to possession. This very difficult juridical conception will be considered by us in the succeeding chapter. We shall see that by the possession of a right (*possessio juris*, *Rechtsbesitz*) is signified the *de facto* relation of continuing exercise and enjoyment, as opposed to the *de jure* relation of ownership. A man may possess a right without owning it, as where the wrongful occupant of land makes use of a right of way or other easement appurtenant to it. Or he may own a right without possessing it. Or finally, ownership and possession may be united, as, indeed, they usually are, the *de jure* and the *de facto* relations being co-existent and coincident.

The ownership of a right is, in the second place, opposed to the encumbrance of it. The owner of the right is he in whom the right itself is vested, while the encumbrancer of it is he in whom is vested, not the right itself, but some adverse, dominant, and limiting right in respect of it. A may be the owner of property, B the lessee of it, C the sub-lessee, D the first mortgagee, E the second mortgagee, and so on indefinitely. Legal nomenclature, however, does not supply separate names for every distinct kind of encumbrancer. There is no distinctive title, for example, by which we may distinguish from the owner of the property him who has an easement over it or the benefit of a covenant which runs with it.

Although encumbrance is thus opposed to ownership, every encumbrancer is nevertheless himself the *owner* of the encumbrance. The mortgagee of the land is the owner of the mortgage. The lessee of the land is the owner of the lease. The mortgagee of the mortgage is the owner of the sub-mortgage. That is to say, he in whom an encumbrance is vested stands in a definite relation, not merely to it, but also to the right encumbered by it. Considered in relation to the latter, he is an encumbrancer, but considered in relation to the former, he is himself an owner.

Ownership is of various kinds, and the following distinctions are of sufficient importance and interest to deserve special examination:

1. Corporeal and Incorporeal Ownership.
2. Sole Ownership and Co-ownership.
3. Trust Ownership and Beneficial Ownership.
4. Legal and Equitable Ownership.
5. Vested and Contingent Ownership.

§ 87. Corporeal and Incorporeal Ownership.

Although the true subject-matter of ownership is in all cases a right, a very common form of speech enables us to speak of the ownership of material things. We speak of owning, acquiring, or transferring, not rights in land or chattels, but the land or chattels themselves. That is to say, we identify by way of metonymy the right with the material thing which is its object. This figure of speech is no less convenient than familiar. The concrete reference to the material object relieves us from the strain of abstract thought. Rights are dim abstractions, while material things are visible realities, and it is easier to think and speak of the latter than of the former, even though the substitution is a mere figure of speech. This device, moreover, is an aid to brevity, no less than to ease of comprehension.

This figurative identification of a right with its object is, however, not always permissible. I may be said to own the money in my hand, but as to that which is due to me, I own, not the money, but a right to it. In the one case I own the material coins; in the other the immaterial debt or *chose in action*. So I own my land, but merely a right of way over the land of my neighbour. If we look, therefore, no deeper than the mere usages of speech, it would seem as if the subject-matter of ownership were sometimes a material object and at other times a right. This, of course, would be a logical absurdity. Ownership may conceivably be in all cases a relation to a material object; or it may in all cases be a relation to a right; but it cannot be sometimes the one and sometimes the other. So long as we remember that the ownership of a material thing is nothing more than a figurative substitute for the ownership of a particular kind of right in respect of that thing, the usage is one of great convenience; but so soon as we attempt to treat it as anything more than a figure of speech, it becomes a fertile source of confusion of thought.

In what case, then, do we use this figure of speech? What is it that determines whether we do or do not identify a right with its object? How is the line drawn between corporeal and incorporeal ownership? The usage is to some extent arbitrary and uncertain. The application of figurative language is a matter not of logic but of variable practice and opinion. Speaking generally, however, we may say that the ownership of a material thing means the ownership of a *jus in re propria* in respect of that thing. No man is said to own a piece of land or a chattel, if his right over it is merely an encumbrance of some more general right vested in some one else. The ownership of a *jus in re aliena* is always incorporeal, even though the object of that right is a corporeal thing. I am not said to own a chattel, merely because I own a right to have it transferred to me, or because I own a lien over it or a right to the temporary use of it.

When, on the other hand, a right is not a mere encumbrance of another right—when it is a self-existent *jus in re propria*—it is identified with the material thing which is its subject-matter. It is not difficult to perceive the origin and reason of this usage of speech. In its full and normal compass a *jus in re propria* over a material object is a right to the entirety of the lawful uses of that object. It is a general right of use and disposal, all *jura in re aliena* being merely special and limited rights derogating from it in special respects. It is only this absolute and comprehensive right—this *universum jus*—that is identified with its object. For it is in some sense coincident with its object, and exhausts the juridical significance of it. It is the greatest right which can exist in respect of the thing, including all lesser rights within itself, and he who owns it may therefore conveniently be said to own the thing itself.

We have said that in its full and normal compass corporeal ownership is the ownership of a right to the entirety of the lawful uses of a corporeal thing. This compass, however, may be limited to any extent by the adverse influences of *jura in re aliena* vested in other persons. The right of the owner of a thing may be all but eaten away by the dominant rights of lessees, mortgagees, and other encumbrancers. His ownership may be reduced to a mere name rather than a reality. Yet he none the less remains the owner of the *thing*, while all the others own nothing more than *rights* over it. For he still owns that *jus in re propria* which, were all encumbrancers removed from it, would straightway expand to its normal dimensions as the *universum jus* of general and permanent use. He, then, is the owner of a material object, who owns a right to the general or residuary uses of it (*a*), after the

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(*a*) Pollock, Jurisprudence, p. 175, 2nd ed.: "Ownership may be described as the entirety of the powers of use and disposal allowed by law. . . . The owner of a thing is not necessarily the person who at a given time has the whole power of use and disposal; very often there is no deduction of all special and limited rights of use vested by way of encumbrance in other persons (*b*).

What, then, is the name of the right which we thus identify, for convenience of speech, with its material object? What shall we call the right which enables the owner of it to say that he owns a piece of land or a chattel? Unfortunately for the lucidity of legal nomenclature, there is, unless we are prepared to use the somewhat awkward Latin term *jus in re propria*, no other name for it than *ownership* itself. This is a use of the term which is quite different from that hitherto considered by us. Ownership, as a particular kind of right, must be clearly distinguished from ownership, as a particular kind of relation to rights of all descriptions. We cannot class together the right of ownership and the ownership of a right. This use of the term to denote a right is the natural outcome of the figurative use of it already considered. When we not only speak of the ownership of land, but interpret such language literally, it is clear that ownership must be taken as the name of the right which the owner has in relation to the land (*c*).

§ 88. Corporeal and Incorporeal Things.

Closely connected with the distinction between corporeal and incorporeal ownership is that between corporeal and incor-

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such person. We must look for the person having the residue of all such power when we have accounted for every detached and limited portion of it; and he will be the owner even if the immediate power of control and use is elsewhere."

(*b*) The figurative identification of a right with its object is not absolutely limited to the case of material things, though this is by far the most important instance. Similar reasons of convenience of speech and ease of thought lead to a similar metonymy in other cases, when the object of a *jus in re propria* has a recognised name. We speak, for example, of the ownership of a trade-mark, or of that of the goodwill of a business; meaning thereby the ownership of a *jus in re propria* in respect of these things.

(*c*) A similar explanation of the distinction between corporeal and incorporeal ownership is given by the following writers:—

Windscheid, I. sect. 42: "A very common form of speech . . . substitutes for the right of ownership (Eigenthumsrecht) the thing in respect of which it exists."

Baudry-Lacantinerie, Des Biens, sect. 9: "This confusion finds its excuse, if not its justification, in the consideration that the right of ownership, being the most complete right which can exist in respect of a thing, since it is absolute and exclusive, is identified with the thing itself."

Bruns, Das Recht des Besitzes, p. 477.

Girard, Droit Romain, p. 244, 2nd ed.

poreal *things*. The term thing (*res, chose, Sache*) is used in three distinct senses by legal writers:—

1. In its first and simplest application it means merely a material object, regarded as the subject-matter of a right (*d*). According to this use, some rights are rights to or over things, and some are not. The owner of a house owns a thing; the owner of a patent does not.

2. In a second and wider sense the term thing includes every subject-matter of a right, whether a material object or not. In this signification every right is a right in or to some thing. A man's life, reputation, health, and liberty are things in law, no less than are his land and chattels (*e*). Things in this sense are either material or immaterial, but the distinction thus indicated must not be confounded with that now to be explained between things corporeal and incorporeal.

3. In a third and last application the term thing means whatever a man owns as part of his estate or property. It is any subject-matter of ownership within the sphere of proprietary or valuable rights. Now we have already seen that according to the current usage of figurative speech ownership is sometimes that of a material object and sometimes that of a right. Things, therefore, as the objects of ownership, are of two kinds also. A corporeal thing (*res corporalis*) is the subject-matter of corporeal ownership; that is to say, a material object. An incorporeal thing (*res incorporalis*) is the subject-matter of incorporeal ownership; that is to say, it is any proprietary right except that right of full dominion over a material object which, as already explained, is figuratively identified with the object itself. If I own a field and a right of way over another, my field is a *res corporalis* and my right of way is a *res incorporalis*. If I own a pound in my pocket and a right to receive another from my debtor, the first pound is a thing corporeal, and the right to receive the second is a thing incorporeal; it is that variety of the latter, which is called, in the technical language of English law, a *chose in*

(*d*) Austin, p. 358. German Civil Code, sect. 90: Sachen im Sinne des Gesetzes sind nur körperliche Gegenstände.

(*e*) *Vide supra*, § 73.

action or thing in action; while the pound in my pocket is a *chose* or thing in possession (*f*).

It is clear that if literally interpreted, this distinction is illogical and absurd. We cannot treat in this way rights and the objects of rights as two species of one genus. If we use the term thing in each case to mean a right, then the right of an owner of land is just as incorporeal as is that of his tenant. On the other hand, if the term is to be taken in each case to mean the object of a right, then the object of the tenant's right is just as corporeal as is that of his landlord. The distinction between corporeal and incorporeal things is based on the same figure of speech as is that between corporeal and incorporeal ownership. Both distinctions become intelligible, so soon as we recognise the metonymy involved in the substitution of the subject-matter of a right for the right itself (*g*).

§ 89. Sole Ownership and Co-Ownership.

As a general rule a right is owned by one person only at a time, but duplicate ownership is perfectly possible. Two or more persons may at the same time have the same right vested in them. This may happen in several distinct ways, but the simplest and most obvious case is that of co-ownership. Partners, for example, are co-owners of the chattels which constitute their stock in trade, of the lease of the premises on which their business is conducted, and of the debts owing to them by their customers. It is not correct to say that a right owned by co-owners is divided between them, each of them owning a separate part. The right is an undivided unity, which is vested at the same time in more than one person. If two partners have at their bank a credit balance of £1,000,

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(*f*) This use of the term thing (*res*) and the distinction between *res corporalis* and *res incorporalis* are derived from Roman Law. Just. Inst. II. 2 :—Quaedam praeterea res corporales sunt, quaedam incorporales. Corporales eae sunt, quae sui natura tangi possunt : veluti fundus, homo, vestis, aurum, argentum, et denique aliae res innumerabiles. Incorporales autem sunt, quae tangi non possunt. Qualia sunt ea, quae in jure consistunt : sicut hereditas, usus fructus, obligationes quoquo modo contractae.

(*g*) The same explanation is applicable to the distinction between corporeal and incorporeal *property*. A person's property consists sometimes of material objects and sometimes of rights. As to the different uses of the term property, see *infra*, ch. xx.

there is one debt of £1,000 owing by the bank to both of them at once, not two separate debts of £500 due to each of them individually. Each partner is entitled to the whole sum, just as each would owe to the bank the whole of the firm's overdraft. The several ownership of a part is a different thing from the co-ownership of the whole. So soon as each of two co-owners begins to own a part of the right instead of the whole of it, the co-ownership has been dissolved into sole ownership by the process known as partition. Co-ownership involves the undivided integrity of the right owned.

Co-ownership, like all other forms of duplicate ownership, is possible only so far as the law makes provision for harmonising in some way the conflicting claims of the different owners *inter se*. In the case of co-owners the title of the one is rendered consistent with that of the other by the existence of reciprocal obligations of restricted use and enjoyment.

Co-ownership may assume different forms by virtue of the different incidents attached to it by law. Its two chief kinds in English law are distinguished as ownership *in common* and *joint* ownership. The most important difference between these relates to the effect of the death of one of the co-owners. In ownership in common the right of a dead man descends to his successors like any other inheritable right. But on the death of one of two joint owners his ownership dies with him, and the survivor becomes the sole owner by virtue of his right of survivorship or *jus accrescendi*.

§ 90. Trust and Beneficial Ownership.

A trust is a very important and curious instance of duplicate ownership. Trust property is that which is owned by two persons at the same time, the relation between the two owners being such that one of them is under an obligation to use his ownership for the benefit of the other. The former is called the trustee, and his ownership is trust-ownership; the latter is called the beneficiary, and his is beneficial ownership (*h*).

(*h*) He who owns property for his own use and benefit, without the intervention of any trustee, may be termed the *direct* owner of it, as opposed to a mere trustee on the one hand, and to a beneficial owner or beneficiary on the other. Thus if A. owns land, and makes a declaration of trust in

The trustee is destitute of any right of beneficial enjoyment of the trust property. His ownership, therefore, is a matter of form rather than of substance, and nominal rather than real. If we have regard to the essence of the matter rather than to the form of it, a trustee is not effectively an owner at all, but in essence a mere agent, upon whom the law has conferred the power and imposed the duty of administering the property of another person. In legal theory, however, he is not a mere agent but an owner. He is a person to whom property substantially that of some one else is technically attributed by the law, albeit on the footing that the rights and powers thus vested in a nominal owner are to be used by him on behalf of the real owner. As between trustee and beneficiary, the law recognises the truth of the matter; as between these two, the property belongs to the latter and not to the former. But as between the trustee and third persons, the fiction prevails. The trustee is clothed with the rights of his beneficiary, and is so enabled to personate or represent him in dealings with the world at large.

The purpose of trusteeship is to protect the rights and interests of persons who for any reason are unable effectively to protect them for themselves. The law vests those rights and interests for safe custody, as it were, in some other person who is capable of guarding them and dealing with them, and who is placed under an obligation to use them for the benefit of him to whom they in truth belong. The chief classes of persons in whose behalf the protection of trusteeship is called for are four in number. In the first place, property may belong to persons who are not yet born; and in order that it may be adequately safeguarded and administered, it is commonly vested in the meantime in trustees, who hold and deal with it on account of its unborn owners. In the second place, similar protection is required for the property of those who lie under some incapacity in respect of the administration of it, such as infancy, lunacy, or absence. Thirdly, it is

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favour of B., the direct ownership of A. is thereby changed into trust-ownership, and a correlative beneficial ownership is acquired by B. If A. then conveys the land to B., the ownership of B. ceases to be merely beneficial, and becomes direct.

expedient that property in which large numbers of persons are interested in common should be vested in trustees. The complexities and difficulties which arise from co-ownership become so great, so soon as the number of co-owners ceases to be small, that it is essential to avoid them; and one of the most effective devices for this purpose is that scheme of duplicate ownership which we term a trust. Fourthly, when persons have conflicting interests in the same property (for example, an owner and an encumbrancer, or different kinds of encumbrancers) it is often advisable that the property should be vested in trustees, whose power and duty it is to safeguard the interests of each of those persons against the conflicting claims of the others.

A trust is to be distinguished from two other relations which resemble it. It is to be distinguished, in the first place, from a mere contractual obligation to deal with one's property in the interests of some one else. A trust is more than an obligation to use one's property for the benefit of another; it is an obligation to use it for the benefit of another in whom it is already concurrently vested. The beneficiary has more than a mere personal right against his trustee to the performance of the obligations of the trust. He is himself an owner of the trust property. That which the trustee owns the beneficiary owns also. If the latter owned nothing save the personal obligation between the trustee and himself, there would be no trust at all. Thus if a husband gratuitously covenants with his wife to settle certain property upon her, he remains the sole owner of it, until he has actually transferred it in fulfilment of his contract; and in the meantime the wife owns nothing save the contractual obligation created by the covenant. There is therefore no trust. If, on the other hand, the husband declares himself a trustee of the property for his wife, the effect is very different. Here also he is under a personal obligation to transfer the property to her, but this is not all. The beneficial ownership of the property passes to the wife forthwith, yet the ownership of the husband is not destroyed. It is merely transformed into a trust-ownership consistent with the concurrent beneficial title of his wife.

In the second place, a trust is to be distinguished from the relation in which an agent stands towards the property which he administers on behalf of his principal. In substance, indeed, as already indicated, these two relations are identical, but in form and in legal theory they are essentially different. In agency the property is vested solely in the person on whose behalf the agent acts, but in trusteeship it is vested in the trustee himself, no less than in the beneficiary. A trustee is, as it were, an agent for the administration of property, who is at the same time the nominal owner of the property so administered by him.

A trust is created by any act or event which separates the trust-ownership of any property from the beneficial ownership of it, and vests them in different persons. Thus the direct owner of property may declare himself a trustee for some one else, who thereupon becomes the beneficial owner; or the direct owner may transfer the property to some one else, to hold it in trust for a third. Conversely, a trust is destroyed by any act or event which reunites in the same hands the two forms of ownership which have become thus separated. The trustee, for example, may transfer the property to the beneficiary, who then becomes the direct owner; or the beneficiary may transfer it to his trustee, with the like result.

Trust-ownership and beneficial ownership are independent of each other in their destination and disposition. Either of them may be transferred, while the other remains unaffected. The trustee may assign to another, who thereupon becomes a trustee in his stead, while the beneficiary remains the same; or the beneficiary may assign to another, while the trust-ownership remains where it was. In like manner, either kind of ownership may be independently encumbered. The trustee may, in pursuance of the powers of the trust, lease or mortgage the property without the concurrence of the beneficiary; and the beneficiary may deal in the same way with his beneficial ownership independently of the trustee.

Whenever the beneficial ownership has been encumbered, either by the creator of the trust or by the beneficial owner himself, the trustee holds the property not only on behalf of the beneficial owner but also on behalf of the beneficial encumbrancers. That is to say, the relation of trusteeship exists between the trustee and all persons beneficially interested in the property, either as owners or encumbrancers. Thus if property is transferred to A., in trust for B. for life, with remainder to C., A. is a trustee not merely for C., the beneficial owner, but also for B., the beneficial encumbrancer. Both are beneficiaries of the trust, and between the trustee and each of them there exists the bond of a trust-obligation (*i*).

§ 91. Legal and Equitable Ownership.

Closely connected but not identical with the distinction between trust and beneficial ownership, is that between legal and equitable ownership. One person may be the legal and another the equitable owner of the same thing at the same time. Legal ownership is that which has its origin in the rules of the common law, while equitable ownership is that which proceeds from rules of equity divergent from the common law. The courts of common law refused to recognise equitable ownership, and denied that the equitable owner was an owner at all. The Court of Chancery adopted a very different attitude. Here the legal owner was recognised no less than the equitable, but the former was treated as a trustee for the latter. Chancery vindicated the prior claims of equity, not by denying the existence of the legal owner, but by taking from him by means of a trust the beneficial enjoyment of his property. The fusion of law and equity effected by the Judicature Act, 1873, has not abolished this distinction; it has simply extended the doctrines of the Chancery to the courts of common law, and as equitable ownership did not extinguish or exclude legal ownership in Chancery, it does not do so now.

The distinction between legal and equitable ownership is not identical with that mentioned in a previous chapter as existing between legal and equitable *rights*. These two forms of ownership would still exist even if all rights were legal. The equitable ownership of a legal right is a different thing from the ownership of an equitable right. Law and equity are discordant not merely as to the *existence* of rights, but also as to the *ownership* of the rights which they both recognise. When a debt is verbally assigned by A. to B., A. remains the legal owner of it none the less, but B. becomes the equitable owner of it. But there are not for that reason *two* debts.

(*i*) On the nature of trusts see Law Quarterly Review, vol. 28, p. 290 (The Place of Trust in Jurisprudence, by W. G. Hart).

There is only one as before, though it has now two owners. So if A., the legal owner of a share in a company, makes a declaration of trust in favour of B., B. becomes forthwith the equitable owner of the share; but it is the same share as before, and not another. The thing which he thus equitably owns is a legal right, which is at the same time legally owned by A. Similarly the ownership of an equitable mortgage is a different thing from the equitable ownership of a legal mortgage.

Nor is the distinction between legal and equitable ownership merely equivalent to that between trust and beneficial ownership. It is true that, whenever the legal estate is in one man and the equitable estate in another, there is a trust. A legal owner is always a trustee for the equitable owner, if there is one. But an equitable owner may himself be merely a trustee for another person. A man may settle upon trust his equitable interest in a trust fund, or his equitable estate in his mortgaged land. In such a case neither trustee nor beneficiary will have anything more than equitable ownership.

If an equitable owner can be a trustee, can a legal owner be a beneficiary? As the law now stands, he cannot. But this is a mere accident of historical development, due to the fact that the courts of common law refused to recognise trusts at all. There is no more theoretical difficulty in allowing that a trustee and his beneficiary may both be legal owners, than in allowing that they may both be equitable owners. Had the courts of common law worked out a doctrine of trusts for themselves this twofold legal ownership would have actually existed.

The practical importance of the distinction between legal and equitable ownership is the same as that already indicated as pertaining to the distinction between legal and equitable rights (*k*).

§ 92. Vested and Contingent Ownership.

Ownership is either vested or contingent. It is vested when the owner's title is already perfect; it is contingent when his title is as yet imperfect, but is capable of becoming perfect on

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(*k*) *Vide supra*, § 85.

the fulfilment of some condition. In the former case he owns the right absolutely; in the latter he owns it merely conditionally. In the former case the investitive fact from which he derives the right is complete in all its parts; in the latter it is incomplete, by reason of the absence of some necessary element, which is nevertheless capable of being supplied in the future. In the meantime, therefore, his ownership is contingent, and it will not become vested until the necessary condition is fulfilled. A testator, for example, may leave property to his wife for her life, and on her death to A., if he is then alive, but if A. is then dead, to B. A. and B. are both owners of the property in question; but their ownership is merely contingent. That of A. is conditional on his surviving the testator's widow; while that of B. is conditional on the death of A. in the widow's lifetime.

The contingent *ownership* of a right does not necessarily involve its contingent *existence*. It need not be a contingent right, because it is contingently owned. Shares and other choses in action may have an absolute existence, though the ownership of them may be contingently and alternatively in A. and B. Money in a bank may be certainly owing to some one, though it may depend on a condition, whether it is owing to C. or D. On the other hand, it may be that the right is contingent in respect of its existence, no less than in respect of its ownership. This is so whenever there is no alternative owner, and when, therefore, the right will belong to no one unless it becomes vested in the contingent owner by the fulfilment of the condition.

It is to be noticed that the contingent ownership of a right is something more than a simple chance or possibility of becoming the owner of it. It is more than a mere *spes acquisitionis*. I have no contingent ownership of a piece of land merely because I may buy it, if I so wish; or because peradventure its owner may leave it to me by his will. Contingent ownership is based not upon the mere possibility of future acquisition, but upon the present existence of an inchoate or incomplete title.

The conditions on which contingent ownership depends are termed conditions *precedent* to distinguish them from another kind known as conditions *subsequent* A condition precedent is one by the fulfilment of which an inchoate title is completed; a condition subsequent is one on the fulfilment of which a title already completed is extinguished. In the former case I acquire absolutely what I have already acquired conditionally. In the latter case I lose absolutely what I have already lost conditionally. A condition precedent involves an inchoate or incomplete investitive fact; a condition subsequent involves an incomplete or inchoate divestitive fact (*l*). He who owns property subject to a power of sale or power of appointment vested in some one else, owns it subject to a condition subsequent. His title is complete, but there is already in existence an incomplete divestitive fact, which may one day complete itself and cut short his ownership.

It is to be noticed that ownership subject to a condition subsequent is not contingent but vested. The condition is attached not to the commencement of vested ownership, but to the continuance of it. Contingent ownership is that which is not yet vested, but may become so in the future; while ownership subject to a condition subsequent is already vested, but may be divested and destroyed in the future. In other words, ownership subject to a condition subsequent is not contingent but determinable. It is ownership already vested, but liable to premature determination by the completion of a divestitive fact which is already present in part.

It is clear that two persons may be contingent owners of the same right that the same time. The ownership of each is alternative to that of the other. The ownership of one is destined to become vested, while that of the other is appointed to destruction. Similarly, the vested ownership of one man may co-exist with the contingent ownership of another. For the event which in the future will vest the right in the one, will at the same time divest it from the other. Thus a testator may leave property to his wife, with a provision that if she marries again, she shall forfeit it in favour of his children. His widow will have the vested ownership of the property,

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(*l*) On investitive and divestitive facts, see chapter xvi., § 120.

and his children the contingent ownership at the same time. Her marriage is a condition subsequent in respect of her own vested ownership, and a condition precedent in respect of the contingent ownership of the children (*m*).

SUMMARY.

Ownership—the relation between a person and a right vested in him.

Ownership, Possession, Encumbrance } The three beneficial relations between persons and rights.

The kinds of Ownership.

1. Corporeal and incorporeal.
    - The ownership of things and that of rights.
    - The ownership of rights and the right of ownership.
    - *Res corporales* and *res incorporales*.
    - Different uses of the term *res* or thing.
        - (*a*) A material object.
        - (*b*) The object of a right.
            - Material and immaterial things.
        - (*c*) The object of ownership.
            - Corporeal and incorporeal things.
2. Sole ownership and co-ownership.
    - Joint ownership and ownership in common.
3. Trust and beneficial ownership.
    - The nature of trusts.
    - The purposes of trusts.
4. Legal and equitable ownership.
5. Vested and contingent ownership.
    - Conditions precedent and subsequent.
    - Contingent and determinable ownership.

(*m*) On vested and contingent ownership, see Windscheid, I. sects. 86—95; Dernburg, Pandekten, I. 82. 105—112; Austin, Lecture 53.

CHAPTER XIII.

POSSESSION.

§ 93. Introduction.

In the whole range of legal theory there is no conception more difficult than that of possession. The Roman lawyers brought their usual acumen to the analysis of it, and since their day the problem has formed the subject of a voluminous literature, while it still continues to tax the ingenuity of jurists. Nor is the question one of mere curiosity or scientific interest, for its practical importance is not less than its difficulty. The legal consequences which flow from the acquisition and loss of possession are many and serious. Possession, in English law for example, is evidence of ownership; the possessor of a thing is presumed to be the owner of it, and may put all other claimants to proof of their title. Long possession is a sufficient title even to property which originally belonged to another. The transfer of possession is one of the chief methods of transferring ownership. The first possession of a thing which as yet belongs to no one is a good title of right. Even in respect of property already owned, the wrongful possession of it is a good title for the wrongdoer, as against all the world except the true owner. Possession is of such efficacy, also, that a possessor may in many cases confer a good title on another, even though he has none himself; as when I obtain a banknote from a thief, or goods from a factor who disposes of them in fraud of his principal. These are some, though only some, of the results which the law attributes to possession, rightful or wrongful. They are sufficient to show the importance in English law of this conception, and the necessity of an adequate analysis of its essential nature. Nor is its importance less in other legal systems.

§ 94. Possession in Fact and in Law.

It is necessary to bear in mind from the outset the distinction between possession in fact and possession in law. We have to remember the possibility of more or less serious divergences between legal notions and the truth of things. Not everything which is recognised as possession by the law need be such in truth and in fact. And conversely the law, by reasons good or bad, may be moved to exclude from the limits of the conception facts which might else be held to fall within them. There are three possible cases in this respect. First, possession may and usually does exist both in fact and in law. The law recognises as possession all that is such in fact, and nothing that is not such in fact, unless there is some special reason to the contrary. Secondly, possession may exist in fact but not in law. Thus the possession by a servant of his master's property is for some purposes not recognised as such by the law, and he is then said to have detention or custody rather than possession. Thirdly, possession may exist in law but not in fact; that is to say, for some special reason the law attributes the advantages and results of possession to some one who as a matter of fact does not possess. The possession thus fictitiously attributed to him is by English lawyers termed *constructive*. The Roman lawyers distinguished possession in fact as *possessio naturalis*, and possession in law as *possessio civilis* (*a*).

In consequence of this divergence, partly intentional and avowed, partly accidental and unavowed, between the law and the fact of possession, it is impossible that any abstract theory should completely harmonise with the detailed rules to be found in any concrete body of law. Such harmony would be possible only in a legal system which had developed with absolute logical rigour, undisturbed by historical accidents, and unaffected by any of those special considerations which in all parts of the law prevent the inflexible and consistent recognition of general principles.

(*a*) Possession in law is sometimes used in a narrow sense to denote possession which is such in law *only* and not both in law and in fact—that is to say, to denote constructive possession (*possessio fictitia*). In the wider sense it denotes all possession which is recognised by the law, whether it does or does not at the same time exist in fact.

It follows from this discordance between law and fact, that a complete theory of possession falls into two parts: first an analysis of the conception itself, and secondly an exposition of the manner in which it is recognised and applied in the actual legal system. It is with the first of those matters that we are here alone concerned.

It is to be noticed that there are not two *ideas* of possession —a legal and a natural (*b*). Were this so, we could dispense altogether with the discussion of possession in fact. There is only one idea, to which the actual rules of law do more or less imperfectly conform. There is no conception which will include all that amounts to possession in law, and will include nothing else, and it is impossible to frame any definition from which the concrete law of possession can be logically deduced. Our task is merely to search for the idea which underlies this body of rules, and of which they are the imperfect and partial expression and application.

The complexities of the English law are increased by the curious circumstance that two distinct kinds of legal possession are recognised in that system. These are distinguished as seisin and possession. To a considerable extent they are governed by different rules and have different effects. I may have seisin of a piece of land but not possession of it, or possession but not seisin, or both at once; and in all those cases I may or may not at the same time have possession in fact. The doctrine of seisin is limited to land; it is one of the curiosities of that most curious of the products of the human intellect, the English law of real property. The doctrine of possession, on the other hand, is common, with certain variations, to land and chattels. The divergence between these two forms of possession in law is a matter of legal history, not of legal theory.

Extraordinary importance was until a comparatively recent period attributed by our law to the acquisition and retention of seisin by the owner of land. Without seisin his right was a mere shadow of ownership, rather than the full reality of it. For many purposes a

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(*b*) An alternative and to some extent simple, way of approaching the study of possession would be to assume, what the author here explicitly denies, that legal and natural possession are two distinct *ideas*. The main problem would then reduce itself to one of ascertaining for any given system of law the criteria whereby possession was recognised as beginning and coming to an end. To have developed the subject on these lines would, however, have amounted to more than a mere editing of Sir John Salmond's thoughtful and instructive chapters. It will suffice, perhaps, to have reminded the student that on this, as on various other topics of legal theory, there may be more than one plausible view.

man *had* only what he possessed—and the form of his possession must be that which amounted to seisin. A dispossessed owner was deprived of his most effective remedies; he could neither alienate his estate, nor leave it by his will; neither did his heirs inherit it after him. The tendency of modern law is to eliminate the whole doctrine of seisin, as an archaic survival of an earlier process of thought, and to recognise a single form of legal possession (*c*).

§ 95. Corporeal and Incorporeal Possession.

We have seen in a former chapter that ownership is of two kinds, being either corporeal or incorporeal. A similar distinction is to be drawn in the case of possession. Corporeal possession is the possession of a material object—a house, a farm, a piece of money. Incorporeal possession is the possession of anything other than a material object—for example, a way over another man's land, the access of light to the windows of a house, a title of rank, an office of profit, and such like. All these things may be possessed as well as owned. The possessor may or may not be the owner of them, and the owner of them may or may not be in possession of them. They may have no owner at all, having no existence *de jure* and yet they may be possessed and enjoyed *de facto*.

Corporeal possession is termed in Roman law *possessio corporis*. Incorporeal possession is distinguished as *possessio juris*, the possession of a right, just as incorporeal ownership is the ownership of a right. The Germans distinguish in like fashion between *Sachenbesitz*, the possession of a material thing, and *Rechtsbesitz*, the possession of a right. The significance of this nomenclature and the nature of the distinction indicated by it will be considered by us later.

It is a question much debated whether incorporeal possession is in reality true possession at all. Some are of opinion that all genuine possession is corporeal, and that the other is related to it by way of analogy merely. They maintain that there is no single generic conception which includes *possessio corporis* and *possessio juris* as its two specific forms. The

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(*c*) See, as to the idea of seisin and the consequences attributed to its presence or absence, a series of interesting articles by Maitland in the L. Q. R., I. 324, II. 481, IV. 24, 286. See also Lightwood, Possession of Land, pp. 4—8.

Roman lawyers speak with hesitation and even inconsistency on the point. They sometimes include both forms under the title of *possessio*, while at other times they are careful to qualify incorporeal possession as *quasi possessio*—something which is not true possession, but is analogous to it. The question is one of no little difficulty, but the opinion here accepted is that the two forms do in truth belong to a single genus. The true idea of possession is wider than that of corporeal possession, just as the true idea of ownership is wider than that of corporeal ownership. The possession of a right of way is generically identical with the possession of the land itself, though specifically different from it.

This being so, the strictly logical order of exposition involves the analysis, in the first place, of the generic conception, in its full compass, followed by an explanation of the *differentia*, which distinguishes *possessio corporis* from *possessio juris*. We shall, however, adopt a different course, confining our attention in the first place to *possessio corporis*, and proceeding thereafter to the analysis of *possessio juris* and to the exposition of the generic idea which comprises both of them. This course is advisable for two reasons. In the first place, the matter is of such difficulty that it is easier to proceed from the specific idea to the generic, than conversely. And in the second place, the conception of corporeal possession is so much more important than that of incorporeal, that it is permissible to treat the latter simply as a supplement to the former, rather than as co-ordinate with it.

§ 96. Corporeal Possession.

Corporeal possession is clearly some form of continuing relation between a person and a material object. It is equally clear that it is a relation of fact and not one of right. It may be, and commonly is, a title of right; but it is not a right itself. A man may possess a thing in defiance of the law, no less than in accordance with it. Nor is this in any way inconsistent with the proposition, already considered by us, that possession may be such either in law or in fact. A thief has possession in law, although he has acquired it contrary to law.

The law condemns his possession as wrongful, but at the same time recognises that it exists, and attributes to it most, if not all, of the ordinary consequences of possession (*d*).

What, then, is the exact nature of that continuing *de facto* relation between a person and a thing, which is known as possession? The answer is apparently this: *The possession of a material object is the continuing exercise of a claim to the exclusive use of it.* It involves, therefore, two distinct elements, one of which is mental or subjective, the other physical or objective. The one consists in the intention of the possessor with respect to the thing possessed, while the other consists in the external facts in which this intention has realised, embodied, or fulfilled itself. These two constituent elements of possession were distinguished by the Roman lawyers as *animus* and *corpus*, and the expressions are conveniently retained by modern writers. The subjective element is called more particularly the *animus possidendi*, *animus sibi habendi*, or *animus domini*.

Apiscimur possessionem, so runs a celebrated sentence of the Roman lawyer Paul (*e*), *corpore et animo, neque per se animo aut per se corpore.* Neither of these is sufficient by itself. Possession begins only with their union, and lasts only until one or other of them disappears. No claim or *animus*, however strenuous or however rightful, will enable a man to acquire or retain possession, unless it is effectually realised or exercised in fact. No mere intent to appropriate a thing will amount to the possession of it. Conversely, the *corpus* without the *animus* is equally ineffective. No mere physical relation of person to thing has any significance in this respect, unless it is the outward form in which the needful *animus* or intent has fulfilled and realised itself. A man does not possess a field because he is walking about in it, unless he has the intent to exclude other persons from the use of it. I may be alone in a room with money that does not belong to me lying

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(*d*) *Possessio* is the *de facto* relation between the possessor and the thing possessed. *Jus possessionis* is the right (if any) of which possession is the source or title. *Jus possidendi* is the right (if any) which a man has to acquire or to retain possession.

(*e*) D. 41. 2. 3. 1.

ready to my hand on the table. I have absolute physical power over this money; I can take it away with me if I please; but I have no possession of it, for I have no such purpose with respect to it.

§ 97. The Animus Possidendi.

We shall consider separately these two elements in the conception. And first of the *animus possidendi*. The intent necessary to constitute possession is the intent to appropriate to oneself the exclusive use of the thing possessed. It is an exclusive claim to a material object. It is a purpose of using the thing oneself and of excluding the interference of other persons. As to this necessary mental attitude of the possessor there are the following observations to be made.

1. The *animus sibi habendi* is not necessarily a claim of right. It may be consciously wrongful. The thief has a possession no less real than that of a true owner. The possessor of a thing is not he who has, or believes that he has, a right to it, but he who intends to act as if he had such a right. To possession in good faith the law may and does allow special benefits which are cut off by fraud, but to possession as such —the fulfilment of the self-assertive will of the individual— good faith is irrelevant.

2. The claim of the possessor must be exclusive. Possession involves an intent to exclude other persons from the uses of the thing possessed. A mere intent or claim of unexclusive use cannot amount to possession of the material thing itself, though it may and often does amount to some form of incorporeal possession. He who claims and exercises a right of way over another man's land is in possession of this right of way; but he is not in possession of the land itself, for he has not the necessary *animus* of exclusion.

The exclusion, however, need not be absolute. I may possess my land notwithstanding the fact that some other person, or even the public at large, possesses a right of way over it. For, subject to this right of way, my *animus possidendi* is still a claim of exclusive use. I intend to exclude all alien interference except such as is justified by the limited and special right of use vested in others.

3. The *animus possidendi* need not amount to a claim or intent to use the thing *as owner.* A tenant, a borrower, or a pledgee may have possession no less real than that of the owner himself. Any degree or form of intended use, however limited in extent or in duration, may, if exclusive for the time being, be sufficient to constitute possession.

4. The *animus possidendi* need not be a claim on one's own behalf. I may possess a thing either on my own account or on account of another. A servant, agent, or trustee may have true possession, though he claims the exclusive use of the thing on behalf of another than himself (*f*).

5. The *animus possidendi* need not be specific, but may be merely general. That is to say, it does not necessarily involve any continuous or present knowledge of the particular thing possessed or of the possessor's relation to it. A general intent with respect to a class of things is sufficient (if coupled with the necessary physical relation) to confer possession of the individual objects belonging to that class, even though their individual existence is unknown. Thus I possess all the books in my library, even though I may have forgotten the existence of many of them. So if I set nets to catch fish, I have a general intent and claim with respect to all the fish that come therein; and my ignorance whether there are any there or not does in no way affect my possession of such as are there. So I have a general purpose to possess my flocks and herds, which is sufficient to confer possession of their increase though unknown to me. So if I receive a letter, I have forthwith the *animus possidendi* with respect to its enclosure; and I do not first acquire possession of the cheque that is inside it, when I open the envelope and see it (*g*). But if, on the other hand, I buy a cabinet believing it to be empty, whereas it contains

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(*f*) It must be remembered that we are speaking of possession in *fact.* Whether possession in law and the various advantages conferred by it are to be attributed to all possessors in fact or only to some of them is a different question with which we are not here concerned. Roman Law, save in exceptional cases, allowed *possessio corporis* only to those who possessed as owners and on their own behalf. In English law, on the other hand, there is no such limitation of legal possession; though even here the possession of a *servant* sometimes fails to obtain legal recognition.

(*g*) *R.* v. *Mucklow*, 1 Moody, C. C. 160.

money hid in a secret drawer, I do not acquire possession of the money until I actually find it; for until then I have no *animus* with respect to it, either general or specific (*h*).

§ 98. The Corpus of Possession.

To constitute possession the *animus domini* is not in itself sufficient, but must be embodied in a *corpus*. The claim of the possessor must be effectively realised in the facts; that is to say, it must be actually and continuously exercised. The will is sufficient only when manifested in an appropriate environment of fact, just as the fact is sufficient only when it is the expression and embodiment of the required intent and will. Possession is the effective realisation in fact of the *animus sibi habendi*.

One of the chief difficulties in the theory of possession is that of determining what amounts to such effective realisation. The true answer seems to be this: that the facts must amount to the actual present exclusion of all alien interference with the thing possessed, together with a reasonably sufficient security for the exclusive use of it in the future. Then, and then only, is the *animus* or self-assertive will of the possessor satisfied and realised. Then, and only then, is there a continuing *de facto* exercise of the claim of exclusive use. Whether this state of facts exists depends on two things: (1) on the relation of the possessor to other persons, and (2) on the relation of the possessor to the thing possessed. We shall consider these two elements of the *corpus possessionis* separately.

§ 99. The Relation of the Possessor to other Persons.

So far as other persons are concerned, I am in possession of a thing when the facts of the case are such as to create a reasonable expectation that I will not be interfered with in the use of it. I must have some sort of security for their acquiescence and non-interference. "The reality," it has

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(*h*) *Merry* v. *Green*, 7 M. & W. 623.

been well said (*i*), "of *de facto* dominion is measured in inverse ratio to the chances of effective opposition." A security for enjoyment may, indeed, be of any degree of goodness or badness, and the prospect of enjoyment may vary from a mere chance up to moral certainty. At what point in the scale, then, are we to draw the line? What measure of security is required for possession. We can only answer: Any measure which normally and reasonably satisfies the *animus domini*. A thing is possessed, when it stands with respect to other persons in such a position that the possessor, having a reasonable confidence that his claim to it will be respected, is content to leave it where it is. Such a measure of security may be derived from many sources, of which the following are the most important (*k*).

1. *The physical power of the possessor.* The physical power to exclude all alien interference (accompanied of course by the needful intent) certainly confers possession; for it constitutes an effective guarantee of enjoyment. If I own a purse of money, and lock it up in a burglar-proof safe in my house, I certainly have possession of it. I have effectively realised my *animus possidendi*, for no one can lay a finger on the thing without my consent, and I have full power of using it myself. Possession thus based on physical power may be looked on as the typical and perfect form. Many writers, however, go so far as to consider it the only form, defining possession as the intention, coupled with the physical power, of excluding all other persons from the use of a material object. We shall see reason to conclude that this is far too narrow a view of the matter.

2. *The personal presence of the possessor.* This source of security must be distinguished from that which has just been mentioned. The two commonly coincide, indeed, but not

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(*i*) Pollock and Wright, Possession in the Common Law, p. 14.

(*k*) "Absolute security for the future," says Dernburg, Pandekten, I. sect. 169, "is not requisite. For it is not to be had. . . . All that is necessary is that according to the ordinary course of affairs one is able to count on the continuing enjoyment of the thing." See also I. sect. 178. See also Pollock and Wright, Possession, p. 13: "That occupation is effective which is sufficient as a rule and for practical purposes to exclude strangers from interfering with the occupier's use and enjoyment."

necessarily. Bolts, bars, and stone walls will give me the physical power of exclusion without any personal presence on my part; and on the other hand there may be personal presence without any real power of exclusion. A little child has no physical power as against a grown man; yet it possesses the money in its hand. A dying man may retain or acquire possession by his personal presence, but certainly not by any physical power left in him. The occupier of a farm has probably no real physical power of preventing a trespass upon it, but his personal presence may be perfectly effective in restraining any such interference with his rights. The respect shown to a man's person will commonly extend to all things claimed by him that are in his immediate presence.

3. *Secrecy.* A third source of *de facto* security is secrecy. If a man will keep a thing safe from others, he may hide it; and he will gain thereby a reasonable guarantee of enjoyment and is just as effectively in possession of the thing, as is the strong man armed who keeps his goods in peace.

4. *Custom.* Such is the tendency of mankind to acquiesce in established usage, that we have here a further and important source of *de facto* security and possession. Did I plough and sow and reap the harvest of a field last year and the year before? Then unless there is something to the contrary, I may reasonably expect to do it again this year, and I am in possession of the field.

5. *Respect for rightful claims.* Possession is a matter of fact and not a matter of right. A claim may realise itself in the facts whether it is rightful or wrongful. Yet its rightfulness, or rather a public conviction of its rightfulness, is an important element in the acquisition of possession. A rightful claim will readily obtain that general acquiescence which is essential to *de facto* security, but a wrongful claim will have to make itself good without any assistance from the law-abiding spirit of the community. An owner will possess his property on much easier terms than those on which a thief will possess his plunder (*l*). The two forms of security, *de facto* and *de*

(*l*) Pollock and Wright, Possession, p. 15: "Physical or *de facto* possession readily follows the reputation of title."

jure, tend to coincidence. Possession tends to draw ownership after it, and ownership attracts possession.

6. *The manifestation of the animus domini.* An important element in the *de facto* security of a claim is the visibility of the claim. Possession essentially consists, it is true, not in the manifestation of the *animus*, but in the realisation of it. But a manifested intent is much more likely to obtain the security of general acquiescence than one which has never assumed a visible form. Hence the importance of such circircumstances as entry, apprehension, and actual use (*m*).

7. *The protection afforded by the possession of other things.* The possession of a thing tends to confer possession of any other thing that is connected with the first or accessory to it. The possession of land confers a measure of security, which *may* amount to possession, with reference to all chattels situated upon it. The possession of a house may confer the possession of the chattels inside it. The possession of a box or a packet may bring with it the possession of its contents. Not necessarily, however, in any of those cases. A man effectually gives delivery of a load of bricks by depositing them on my land, even in my absence; but he could not deliver a roll of banknotes by laying them upon my doorstep. In the former case the position of the thing is normal and secure; in the latter it is abnormal and insecure.

Notwithstanding some judicial dicta to the contrary, it does not seem to be true, either in law or in fact, that the possession of land necessarily confers possession of all chattels that are on or under it; or that the possession of a receptacle such as a box, bag, or cabinet, necessarily confers possession of its contents. Whether the possession of one thing will bring with it the possession of another that is thus connected with it depends upon the circumstances of the particular case. A chattel may be upon my land, and yet I shall have no possession of it unless the *animus* and *corpus possessionis* both exist. I may have no *animus;* as when my neighbour's sheep, with or without my knowledge, stray into my field. There may

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(*m*) In the words of Ihering: "The visibility of possession is of decisive importance for its security." Grund des Besitzesschutzes, p. 190.

be no *corpus;* as when I lose a jewel in my garden, and cannot find it again. There may be neither *corpus* nor *animus;* as when, unknown to me, there is a jar of coins buried somewhere upon my estate. So in the case of chattels, the possession of the receptacle does not of necessity carry with it the possession of its contents. As already stated, if I buy a cabinet containing money in a secret drawer, I acquire no possession of the money, till I actually discover it. For I have no *animus possidendi* with respect to any such contents, but solely with respect to the cabinet itself.

That this is so in English law, no less than in fact, appears from the following cases:—

In *Bridges* v. *Hawkesworth* (*n*) a parcel of bank-notes was dropped on the floor of the defendant's shop, where they were found by the plaintiff, a customer. It was held that the plaintiff had a good title to them as against the defendant. For the plaintiff, and not the defendant, was the first to acquire possession of them. The defendant had not the necessary *animus*, for he did not know of their existence.

In *R.* v. *Moore* (*o*) a bank-note was dropped in the shop of the prisoner, who on discovering it, picked it up and converted it to his own use, well knowing that the owner could be found. It was held that he was rightly convicted of larceny; from which it follows that he was not in possession of the note until he actually discovered it.

In *Merry* v. *Green* (*p*) the plaintiff purchased a bureau at auction, and subsequently discovered money in it, hidden in a secret drawer and belonging to the vendor. The plaintiff thereupon appropriated the money; and it was held that in doing so he committed theft, as he obtained possession of the money not when he innocently bought the bureau, but when he fraudulently abstracted the contents of it.

In *Cartwright* v. *Green* (*q*) a bureau was delivered for the purpose of repairs to a carpenter, who discovered in a secret drawer money which he converted to his own use. It was held that he committed larceny, by feloniously taking the money into his possession.

On the other hand the possession of the receptacle *may* confer possession of the contents, even though their existence is unknown; for there may at the time of taking the receptacle be a general intent to take its contents also. He who steals a purse, not knowing whether there is money in it, steals the money in it at the same time.

Thus in *R.* v. *Mucklow* (*r*) a letter containing a bank-draft was

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(*n*) 21 L. J. Q. B. 75.

(*o*) L. & C. 1.

(*p*) 7 M. & W. 623.

(*q*) 8 Ves. 405; 7 R. R. 99.

(*r*) 1 Moody C. C. 160.

delivered by mistake to the prisoner, whose name was identical with that of the person for whom the letter was intended. He received the letter innocently; but on subsequently opening it and finding that it was not meant for him, he appropriated the draft. It was held that he was not guilty of larceny. For the innocent possession of the letter brought with it the innocent possession of its contents, and no subsequent fraudulent dealing with the thing thus innocently obtained could amount to theft.

There are, however, certain cases which seem to indicate that the possessor of land possesses whatever is in it or under it.

In *Elwes* v. *Brigg Gas Co.* (*s*) the defendant company took a lease of land from the plaintiff for the purpose of erecting gas works, and in the process of excavation found a prehistoric boat six feet below the surface. It was held that the boat belonged to the landlord, and not to the tenants who discovered it. Chitty, J., says of the plaintiff: "Being entitled to the inheritance . . . and in lawful possession, he was in possession of the ground, not merely of the surface, but of everything that lay beneath the surface down to the centre of the earth, and consequently in possession of the boat. . . . In my opinion it makes no difference in these circumstances that the plaintiff was not aware of the existence of the boat."

So in *South Staffordshire Water Co.* v. *Sharman* (*t*) the defendant was employed by the plaintiff company to clean out a pond upon their land, and in doing so he found certain gold rings at the bottom of it. It was held that the company was in first possession of these rings, and the defendant, therefore, had acquired no title to them.

Cases such as these, however, are capable of explanation on other grounds, and do not involve any necessary conflict either with the theory of possession or with the cases already cited, such as *Bridges* v. *Hawkesworth*. The general principle is that the first finder of a thing has a good title to it against all but the true owner, even though the thing is found on the property of another person (*Armory* v. *Delamirie* (*u*), *Bridges* v. *Hawkesworth*). This principle, however, is subject to important exceptions, in which, owing to the special circumstances of the case, the better right is in him on whose property the thing is found. The chief of these exceptional cases are the following:—

1. When he on whose property the thing is found is already in possession not merely of the property, but of the thing itself; as in certain circumstances, even without specific knowledge, he undoubtedly may be. His prior possession will then confer a better right as against the finder. If I sell a coat in the pocket of which, unknown to me, there is a purse which I picked up in the street, and the

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(*s*) 33 Ch. D. 562.

(*t*) (1896) 2 Q. B. 44.

(*u*) 1 Smith, L. C. 10th ed. 343; 1 Strange, 504.

purchaser of the coat finds the purse in it, it may be assumed with some confidence that I have a better right to it than he has, though it does not belong to either of us.

2. A second limitation of the right of a finder is that, if any one finds a thing as the servant or agent of another, he finds it not for himself, but for his employer. If I instruct a carpenter to break open a locked box for me, he must give up to me whatever he finds in it. This seems a sufficient explanation of such a case as *Sharman's*. The rings found at the bottom of the pond were not in the company's possession in fact; and it seems contrary to other cases to hold that they were so in law. But though Sharman was the first to obtain possession of them, he obtained it for his employers, and could claim no title for himself (*x*).

3. A third case in which a finder obtains no title is that in which he gets possession only through a trespass or other act of wrongdoing. If a trespasser seeks and finds treasure in my land, he must give it up to me, not because I was first in possession of it (which is not the case), but because he cannot be suffered to retain any advantage derived from his own wrong. This seems a sufficient explanation of *Elwes* v. *Brigg Gas Co.* "The boat," says Chitty, J. (*y*), "was embedded in the land. A mere trespasser could not have taken possession of it; he could only have come at it by further acts of trespass involving spoil and waste of the inheritance." According to the true construction of the lease the tenants, though entitled to excavate and remove soil, were not entitled to remove anything else. They must leave the premises as they found them, save in so far as they were authorised to do otherwise by the terms of their lease.

§ 100. Relation of the Possessor to the Thing Possessed.

The second element in the *corpus possessionis* is the relation of the possessor to the thing possessed, the first being that which we have just considered, namely, the relation of the possessor to other persons. To constitute possession the *animus domini* must realise itself in both of those relations. The necessary relation between the possessor and the thing possessed is such as to admit of his making such use of it as accords with the nature of the thing and of his claim to it.

(*x*) The editor would, however, submit that there may have been some materiality in the circumstance that both in *Elwes* v. *Brigg Gas Co.* and in *Sharman's Case* the chattels will presumably have been present even at the time of the original taking by the plaintiff of possession of the land. See also for a criticism of the *ratio decidendi* of *Sharman's Case*, Clerk and Lindsell's Law of Torts, Appendix.

(*y*) 33 Ch. D. 562, at p. 568.

There must be no barrier between him and it, inconsistent with the nature of the claim he makes to it. If I desire to catch fish, I have no possession of them till I have them securely in my net or on my line. Till then my *animus domini* has not been effectively embodied in the facts. So possession once gained may be lost by the loss of my power of using the thing; as when a bird escapes from its cage, or I drop a jewel in the sea. It is not necessary that there should be anything in the nature of physical presence or contact. So far as the physical relation between person and thing is concerned, I may be in possession of a piece of land at the other side of the world. My power of using a thing is not destroyed by my voluntary absence from it, for I can go to it when I will.

Some amount of difficulty or even uncertainty in coming to the enjoyment of a thing is not inconsistent with the present possession of it. My cattle have strayed, but they will probably be found. My dog is away from home, but he will probably return. I have mislaid a book, but it is somewhere within my house and can be found with a little trouble. These things, therefore, I still possess, though I cannot lay my hands on them at will. I have with respect to them a reasonable and confident expectation of enjoyment. But if a wild bird escapes from its cage, or a thing is hopelessly mislaid, whether in my house or out of it, I have lost possession of it. Such a loss of the proper relation to the thing itself is very often at the same time the loss of the proper relation to other persons. Thus if I drop a shilling in the street, I lose possession on both grounds. It is very unlikely that I shall find it myself, and it is very likely that some passer-by will discover and appropriate it.

CHAPTER XIV.

POSSESSION (*continued*).

§ 101. Immediate and Mediate Possession.

One person may possess a thing for and on account of some one else. In such a case the latter is in possession by the agency of him who so holds the thing on his behalf. The possession thus held by one man through another may be termed *mediate*, while that which is acquired or retained directly or personally may be distinguished as *immediate* or *direct*. If I go myself to purchase a book, I acquire direct possession of it; but if I send my servant to buy it for me, I acquire mediate possession of it through him, until he has brought it to me, when my possession becomes immediate.

Of mediate possession there are three kinds (*a*). The first is that which I acquire through an agent or servant; that is to say, through some one who holds solely on my account and claims no interest of his own. In such a case I undoubtedly acquire or retain possession; as, for example, when I allow my servant to use my tools in his work, or when I send him to buy or borrow a chattel for me, or when I deposit goods with a warehouseman who holds them on my account, or when I send my boots to a shoemaker to be repaired. In all such cases, though the immediate possession is in the servant, warehouseman, or artisan, the mediate possession is in me; for the

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(*a*) The explicit recognition of mediate possession (mittelbarer Besitz) in its fullest extent is a characteristic feature of the German Civil Code (sects. 868-871) : "If any one possesses a thing as usufructuary, pledgee, tenant, borrower, or depositee, or in any similar capacity by virtue of which he is entitled or bound with respect to some other person to keep possession of the thing for a limited time, then that other person has possession of it also (mediate possession)." See Dernburg, Das bürgerliche Recht, III. sect. 13. Windscheid, I. pp. 697-701.

immediate possession is held on my account, and my *animus domini* is therefore sufficiently realised in the facts.

The second kind of mediate possession is that in which the direct possession is in one who holds both on my account and on his own, but who recognises my superior right to obtain from him the direct possession whenever I choose to demand it. That is to say, it is the case of a borrower, hirer, or tenant at will. I do not lose possession of a thing because I have lent it to some one who acknowledges my title to it and is prepared to return it to me on demand, and who in the meantime holds it and looks after it on my behalf. There is no difference in this respect between entrusting a thing to a servant or agent and entrusting it to a borrower. Through the one, as well as through the other, I retain as regards all other persons a due security for the use and enjoyment of my property. I myself possess whatever is possessed for me on those terms by another (*b*).

There is yet a third form of mediate possession, respecting which more doubt may exist, but which must be recognised by sound theory as true possession. It is the case in which the immediate possession is in a person who claims it for himself until some time has elapsed or some condition has been fulfilled, but who acknowledges the title of another for whom he holds the thing, and to whom he is prepared to deliver it when his own temporary claim has come to an end: as for example when I lend a chattel to another for a fixed time, or deliver it as a pledge to be returned on the payment of a debt. Even in such a case I retain possession of the thing, so far as third persons are concerned. The *animus* and the *corpus* are both present; the *animus*, for I have not ceased, subject to the

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(*b*) In *Ancona* v. *Rogers* (1 Ex. D. at p. 292) it is said in the judgment of the Exchequer Chamber: "There is no doubt that a bailor who has delivered goods to a bailee to keep them on account of the bailor, may still treat the goods as being in his own possession, and can maintain trespass against a wrongdoer who interferes with them. It was argued, however, that this was a mere legal or constructive possession of the goods. . . We do not agree with this argument. It seems to us that goods which have been delivered to a bailee to keep for the bailor, such as a gentleman's plate delivered to his banker, or his furniture warehoused at the Pantechnicon, would in a popular sense as well as in a legal sense be said to be still in his possession."

temporary right of another person, to claim the exclusive use of the thing for myself; the *corpus*, inasmuch as through the instrumentality of the bailee or pledgee, who is keeping the thing safe for me, I am effectually excluding all other persons from it, and have thereby attained a sufficient security for its enjoyment. In respect of the effective realisation of the *animus domini*, there seems to be no essential difference between entrusting a thing to an agent, entrusting it to a bailee at will, and entrusting it to a bailee for a fixed term, or to a creditor by way of pledge. In all these cases I get the benefit of the immediate possession of another person, who, subject to his own claim, if any, holds and guards the thing on my account. If I send a book to be bound, can my continued possession of it depend on whether the binder has or has not a lien over it for the price of the work done by him? If I lend a book to a friend, can my possession of it depend on whether he is to return it on demand or may keep it till to-morrow? Such distinctions are irrelevant, and in any alternative my possession as against third persons is unaffected.

A test of the existence of a true mediate possession in all the foregoing cases is to be found in the operation of the law of prescription. A title by prescription is based on long and continuous possession. But he who desires to acquire ownership in this way need not retain the *immediate* possession of the thing. He may let his land to a tenant for a term of years, and his possession will remain unaffected, and prescription will continue to run in his favour. If he desires to acquire a right of way by prescription, his tenant's use of it is equivalent to his own. For all the purposes of the law of prescription mediate possession in all its forms is as good as immediate. In *Haig* v. *West* (*c*) it is said by Lindley, L.J.: "The vestry by their tenants occupied and enjoyed the lanes as land belonging to the parish. . . . The parish have in our opinion gained a title to those parish lanes by the Statute of Limitations. The vestry have by their tenants occupied and enjoyed the lanes for more than a century."

In the case of chattels a further test of the legal recognition of mediate possession in all its forms is to be found in the law as to delivery by attornment. In *Elmore* v. *Stone* (*d*) A. bought a horse from B., a livery stable keeper, and at the same time agreed that it should remain at livery with B. It was held that by this agreement

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(*c*) (1893) 2 Q. B. 30, 31.

(*d*) 1 Taunt. 458; 10 R. R. 578.

the horse had been effectually delivered by B. to A., though it had remained continuously in the physical custody of B. That is to say, A. had acquired mediate possession, through the direct possession which B. held on his behalf. The case of *Marvin* v. *Wallace* (e) goes still further. A. bought a horse from B., and, without any change in the immediate possession, lent it to the seller to keep and use as a bailee for a month. It was held that the horse had been effectually delivered by B. to A. This was mediate possession of the third kind, being acquired and retained through a bailee for a fixed term. Crompton, J., referring to *Elmore* v. *Stone*, says (f): "In the one case we have a bailment of a description different from the original possession; here we have a loan; but in each case the possession of the bailee is the possession of the bailor; it would be dangerous to distinguish between such cases."

In all cases of mediate possession two persons are in possession of the same thing at the same time. Every mediate possessor stands in relation to a direct possessor through whom he holds. If I deposit goods with an agent, he is in possession of them as well as I. He possesses for me, and I possess through him. A similar duplicate possession exists in the case of master and servant, landlord and tenant, bailor and bailee, pledgor and pledgee. In all such cases, however, there is an important distinction to be noticed. Mediate possession exists as against third persons only, and not as against the immediate possessor. Immediate possession, on the other hand, is valid as against all the world, including the mediate possessor himself. Thus if I deposit goods with a warehouseman, I retain possession as against all other persons; because as against them I have the benefit of the warehouseman's custody. But as between the warehouseman and myself, he is in possession and not I. For as against him I have in no way realised my *animus possidendi* nor in any way obtained a security of use and enjoyment. So in the case of a pledge, the debtor continues to possess *quoad* the world at large; but as between debtor and creditor, possession is in the latter. The debtor's possession is mediate and relative; the creditor's is immediate and absolute. So also with landlord and tenant, bailor and bailee, master and servant, principal and agent, and all other cases of mediate possession.

(e) 6 El. & B. 726.

(f) At p. 735.

Here also we may find a test in the operation of prescription. As between landlord and tenant, prescription, if it runs at all, will run in favour of the tenant; but at the same time it may run in favour of the landlord as against the true owner of the property. Let us suppose, for example, that possession for twenty years will in all cases give a good title to land, and that A. takes wrongful possession of land from X., holds it for ten years, and then allows B. to have the gratuitous use of it as tenant at will. In ten years more A. will have a good title as against X., for, as against him, A. has been continuously in possession. But in yet another ten years B., the tenant, will have a good title as against his landlord, A., for as between these two the possession has been for twenty years in B.

To put the matter in a general form, prescription runs in favour of the immediate against the mediate possessor, but in favour of the mediate possessor as against third persons.

§ 102. Concurrent Possession.

It was a maxim of the civil law that two persons could not be in possession of the same thing at the same time. *Plures eandem rem in solidum possidere non possunt* (*g*). As a general proposition this is true; for exclusiveness is of the essence of possession. Two adverse claims of exclusive use cannot both be effectually realised at the same time. Claims, however, which are not adverse, and which are not, therefore, mutually destructive, admit of concurrent realisation. Hence there are several possible cases of duplicate possession.

1. Mediate and immediate possession coexist in respect of the same thing as already explained.

2. Two or more persons may possess the same thing in common, just as they may own it in common. This is called *compossessio* by the civilians.

3. Corporeal and incorporeal possession may coexist in respect of the same material object, just as corporeal and incorporeal ownership may. Thus A. may possess the land, while B. possesses a right of way over it. For it is not necessary, as we have already seen, that A.'s claim of exclusive use should be absolute; it is sufficient that it is general.

(*g*) D. 41. 2. 3. 5.

§ 103. The Acquisition of Possession.

Possession is acquired whenever the two elements of *corpus* and *animus* come into co-existence, and it is lost so soon as either of them disappears. The modes of acquisition are two in number, namely Taking and Delivery. Taking is the acquisition of possession without the consent of the previous possessor. The thing taken may or may not have been already in the possession of some one else, and in either case the taking of it may be either rightful or wrongful. Delivery, on the other hand, is the acquisition of possession with the consent and co-operation of the previous possessor. It is of two kinds, distinguished by English lawyers as actual and constructive (*h*). Actual delivery is the transfer of *immediate* possession; it is such a physical dealing with the thing as transfers it from the hands of one person to those of another. It is of two kinds, according as the *mediate* possession is or is not retained by the transferor. The delivery of a chattel by way of sale is an example of delivery without any reservation of mediate possession; the delivery of a chattel by way of loan or deposit is an instance of the reservation of mediate possession on the transfer of immediate.

Constructive delivery, on the other hand, is all which is not actual, and it is of three kinds. The first is that which the Roman lawyers termed *traditio brevi manu*, but which has no recognised name in the language of English law. It consists in the surrender of the mediate possession of a thing to him who is already in immediate possession of it. If, for example, I lend a book to some one, and afterwards, while he still retains it, I agree with him to sell it to him, or to make him a present of it, I can effectually deliver it to him in fulfilment of this sale or gift, by telling him that he may keep it. It is not necessary for him to go through the form of handing it back to me and receiving it a second time from my hands. For he has already the immediate possession of it, and all that is needed for delivery under the sale or gift is the destruction

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(*h*) These terms, however, are not strictly accurate, inasmuch as the so-called constructive delivery is a perfectly real transfer of possession, and involves no element of fiction whatever.

of the *animus* through which mediate possession is still retained by me (*i*).

The second form of constructive delivery is that which the commentators on the civil law have termed *constitutum possessorium* (that is to say, an agreement touching possession). This is the converse of *traditio brevi manu*. It is the transfer of mediate possession, while the immediate possession remains in the transferor. Any thing may be effectually delivered by means of an agreement that the possessor of it shall for the future hold it no longer on his own account but on account of some one else. No physical dealing with the thing is requisite, because by the mere agreement mediate possession is acquired by the transferee, through the immediate possession retained by the transferor and held on the other's behalf. Therefore, if I buy goods from a warehouseman, they are delivered to me so soon as he has agreed with me that he will hold them as warehouseman on my account. The position is then exactly the same as if I had first taken actual delivery of them, and then brought them back to the warehouse, and deposited them there for safe custody (*k*).

The third form of constructive delivery is that which is known to English lawyers as attornment (*l*). This is the transfer of mediate possession, while the immediate possession remains outstanding in some third person. The mediate possessor of a thing may deliver it by procuring the immediate possessor to agree with the transferee to hold it for the future on his account, instead of on account of the transferor. Thus if I have goods in the warehouse of A., and sell them to B., I have effectually delivered them to B., so soon as A. has agreed with B. to hold them for him, and no longer for me. Neither in this nor in any other case of constructive delivery is any physical dealing with the thing required, the change in

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(*i*) For examples of *traditio brevi manu*, see *Winter* v. *Winter*, 4 L. T. (N. S.) 639; *Cain* v. *Moon*, (1896), 2 Q. B. 283; *Richer* v. *Voyer*, L. R. 5 P. C. 461.

(*k*) For examples of *constitutum possessorium*, see *Elmore* v. *Stone*, 1 Taunt. 458; 10 R. R. 578; *Marvin* v. *Wallace*, 6 El. & Bl. 726. See *supra*, § 101.

(*l*) *Constitutum possessorium*, also, may be termed attornment in a wide sense.

the *animus* of the persons concerned being adequate in itself (*m*).

§ 104. Possession not Essentially the Physical Power of Exclusion.

According to a widely accepted theory the essence of corporeal possession is to be found in the physical power of exclusion. The *corpus possessionis*, it is said, is of two kinds, according as it relates to the commencement or to the continuance of possession. The *corpus* required at the commencement is the present or actual physical power of using the thing oneself and of excluding all other persons from the use of it. The *corpus* required for the retention of a possession once acquired may, on the other hand, consist merely in the ability to reproduce this power at will. Thus I acquire possession of a horse if I take him by the bridle, or ride upon him, or otherwise have him in my immediate personal presence, so that I can prevent all other persons from interfering with him. But no such immediate physical relation is necessary to retain the possession so acquired. I can put the horse in my stable, or let him run in a field. So long as I can go to him when I wish, and reproduce at will the original relation of physical power, my possession has not ceased. To this view of the matter, however, the following objections may be made (*n*).

1. Even at the commencement a possessor need have no physical power of excluding other persons. What physical power of preventing trespass does a man acquire by making an entry upon an estate which may be some square miles in extent? Is it not clear that he may have full possession of land that is absolutely unfenced and unprotected, lying open

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(*m*) Delivery by attornment is provided for by the Sale of Goods Act, 1893, s. 29 (3): "Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf."

(*n*) The theory here considered is that which has been made familiar by Savigny's celebrated treatise on Possession (Recht des Besitzes, 1803). The influence of this work was long predominant on the Continent and considerable in England, and it still finds no small amount of acceptance. A forcible statement of the objections to Savigny's doctrine is contained in Ihering's Grund des Besitzesschutzes, pp. 160—193.

to every trespasser? There is nothing to prevent even a child from acquiring effective possession as against strong men, nor is possession impossible on the part of him who lies in his bed at the point of death. If I stretch a net in the sea, do I not acquire the possession of the fish caught in it, so soon as they are caught? Yet every other fisherman that passes by has more power of excluding me than I have of excluding him. So if I set traps in the forest, I possess the animals which I catch in them, though there is neither physical presence nor physical power. If in my absence a vendor deposits a load of stone or timber on my land, do I not forthwith acquire possession of it? Yet I have no more physical power over it than any one else has. I may be a hundred miles from my farm, without having left any one in charge of it; but I acquire possession of the increase of my sheep and cattle.

In all such cases the assumption of physical power to exclude alien interference is no better than a fiction. The true test is not the physical power of preventing interference, but the improbability of any interference, from whatever source this improbability arises. Possession is the security of enjoyment, and there are other means of attaining this security than personal presence or power. It is true that in time of war the possession of a place must be obtained and defended by cannon and bayonets; but in the peaceful intercourse of fellow-citizens under the rule of law, possession can be acquired and retained on much easier terms and in much simpler fashion. The chances of hostile interference are determined by other considerations than that of the amount of physical force at the disposal of the claimant. We have to take account of the customs and opinions of the community, the spirit of legality and of respect for rightful claims, and the habit of acquiescence in established facts. We have to consider the nature of the uses of which the thing admits, the nature of the precautions which are possibly or usually taken in respect of it, the opinion of the community as to the rightfulness of the claim seeking to realise itself, the extent of lawless violence that is common in the society, the opportunities for interference and the temptations to it; and lastly but not exclusively the physical power of the possessor to defend himself against aggression. If, having regard to these circumstances and to such as these, it appears that the *animus possidendi* has so prospered as to have acquired a reasonable security for its due fulfilment, there is true possession, and if not, not.

2. In the second place it is by no means clear how it is possible for possession at its commencement and possession in its continuance to be made up of different elements. How can it be that possession at its inception involves actual physical power of exclusion, while in its continuance it involves merely the power of reproducing this primary relationship? Possession is a continuing *de facto* relation between a person and a thing. Surely, therefore, it must from beginning to end have the same essential nature. What is that nature? Savigny's theory affords no answer. It tells us, at the most, how possession begins, and how it ceases; but we wish to know what it essentially and continuously *is*.

3. Thirdly and lastly, the theory which we are considering is inapplicable to the possession of incorporeal things. Even if it successfully explained the possession of land, it would afford no explanation of the possession of a right of way or other servitude. Here there is neither exclusion nor the power of exclusion. It is, on the contrary, the possessor of the servient land who has the physical power of excluding the possessor of the servitude. If I possess an easement of light, what power have I to prevent its infringement by the building operations of my neighbour? It is true that this is not a conclusive objection to Savigny's analysis; for it remains perfectly open to him to rejoin that possession in its proper sense is limited to the possession of corporeal things, and that its extension to incorporeal things is merely analogical and metaphorical. The fact remains, however, that this extension has taken place; and, other things being equal, a definition of possession which succeeds in including both its forms is preferable to one which is forced to reject one of them as improper.

§ 105. Incorporeal Possession.

Hitherto we have limited our attention to the case of corporeal possession. We have now to consider incorporeal, and to seek the generic conception which includes both these forms. For I may possess not the land itself. but a way over it, or the access of light from it, or the support afforded by it to my land which adjoins it. So also I may possess powers, privileges, immunities, liberties, offices, dignities, services, monopolies. All these things may be possessed as well as owned. They may be possessed by one man, and owned by another. They may be owned and not possessed, or possessed and not owned.

Corporeal possession is, as we have seen, the continuing exercise of a claim to the exclusive use of a material object. Incorporeal possession is the continuing exercise of a claim to anything else. The thing so claimed may be either the non-exclusive use of a material object (for example, a way or other servitude over a piece of land) or some interest or advantage unconnected with the use of material objects (for example a trade-mark, a patent, or an office of profit).

In each kind of possession there are the same two elements required, namely the *animus* and the *corpus*. The *animus* is the claim—the self-assertive will of the possessor. The *corpus* is the situation of external fact in which this claim has realised, embodied, and fulfilled itself. Possession, whether corporeal or incorporeal, exists only when the *animus possidendi* has succeeded in establishing a continuing practice in conformity with itself. Nor can any practice be said to be continuing, unless some measure of future existence is guaranteed to it by the facts of the case. The possession of a thing is the *de facto* condition of its continuous and secure enjoyment.

In the case of corporeal possession the *corpus possessionis* consists, as we have seen, in nothing more than the continuing exclusion of alien interference, coupled with ability to use the thing oneself at will. Actual use of it is not essential. I may lock my watch in a safe, instead of keeping it in my pocket; and though I do not look at it for twenty years, I remain in possession of it none the less. For I have continuously exercised my claim to it, by continuously excluding other persons from interference with it. In the case of incorporeal possession, on the contrary, since there is no such claim of exclusion, actual continuous use and enjoyment is essential, as being the only possible mode of exercise. I can acquire and retain possession of a right of way only through actual and repeated use of it. In the case of incorporeal things continuing non-use is inconsistent with possession, though in the case of corporeal things it is consistent with it.

Incorporeal possession is commonly called the possession of a *right*, and corporeal possession is distinguished from it as the possession of a *thing*. The Roman lawyers distinguish between *possessio juris* and *possessio corporis*, and the Germans between *Rechtsbesitz* and *Sachenbesitz*. Adopting this nomenclature, we may define incorporeal possession as the continuing exercise of a right, rather than as the continuing exercise of a claim. The usage is one of great convenience, but it must not be misunderstood. To exercise a right here means to exercise a claim *as if it were a right*. There may be no right in reality; and where there *is* a right, it may be vested in some other person, and not in the possessor. If I possess a way over another's land, it may or may not be a *right* of way; and even if it is a right of way, it may be owned by some one else, though possessed by me. Similarly a trade-mark or a patent which is possessed and exercised by me may or may not be legally valid; it may exist *de facto* and not also *de jure*; and even if legally valid, it may be legally vested not in me, but in another (*o*).

The distinction between corporeal and incorporeal possession

(*o*) Bruns rejects the definition of possession as consisting in the continuing exercise of a right, and defines it as the continuous possibility of exercising a right at will. "Just as corporeal possession," he says (Recht des Besitzes, p. 475), "consists not in actual dealing with the thing, but only in the power of dealing with it at will, so incorporeal possession consists not in the actual exercise of a right, but in the power of exercising it at will; and it is only because the existence of this power does not become visible as an objective fact until actual exercise of the right has taken place, that such actual exercise is recognised as an essential condition of the commencement of possession." This, however, seems incorrect. Possession consists not in the power of exercising a claim in the future, but in the power of *continuing to exercise it* from now onwards.

is clearly analogous to that between corporeal and incorporeal ownership. Corporeal possession, like corporeal ownership, is that of a thing; while incorporeal possession, like incorporeal ownership, is that of a right. Now in the case of ownership we have already seen that this distinction between things and rights is merely the outcome of a figure of speech, by which a certain kind of right is identified with the material thing which is its object. A similar explanation is applicable in the case of possession. The possession of a piece of land means in truth the possession of the exclusive use of it, just as the possession of a right of way over land means the possession of a certain non-exclusive use of it. By metonymy the exclusive use of the thing is identified with the thing itself, though the non-exclusive use of it is not. Thus we obtain a distinction between the possession of things and the possession of rights, similar to that between the ownership of things and the ownership of rights (*p*).

(*p*) Thus in the Civil Code of France it is said (sect. 2228): La possession est la détention ou la jouissance d'une chose ou d'un droit que nous tenons ou que nous exercons par nous-mêmes ou par un autre qui la tient ou qui l'exerce en notre nom.

The definition of the Italian Civil Code is similar (sect. 685): "Possession is the detention of a thing or the enjoyment of a right by any person either personally or through another who detains the thing or exercises the right in his name."

A good analysis of the generic conception of possession, and of the relation between its two varieties, is to be found in Baudry-Lacantinerie's Traité de Droit Civil (De la Prescription, sect. 199): "Possession is nothing else than the exercise or enjoyment, whether by ourselves or through the agency of another, of a real right which we have or claim to have over a thing. It makes no difference whether this right is one of ownership or one of some other description, such as *ususfructus*, *usus*, *habitatio*, or *servitus*. The old distinction between possession and quasi-possession, which was recognised by Roman law and is still to be found in the doctrine of Pothier, has been rejected, and rightly so. It was in our opinion nothing more than a result of that confusion between the right of ownership and the object of that right, which has been at all times prevalent. Possession is merely the exercise of a right, in reality it is not the thing which we possess, but the right which we have or claim to have over the thing. This is as true of the right of ownership as of the right of servitude and usufruct; and consequently the distinction between the possession of a thing and the quasi-possession of a right is destitute of foundation."

See to the same effect Ihering, Grund des Besitz. p. 159: "Both forms of possession consist in the exercise of a right (die Ausübung eines Rechts)." Bruns, also, recognises the figure of speech on which the distinction between corporeal and incorporeal possession is based. Recht des Besitzes, p. 477.

In essence, therefore, the two forms of possession are identical, just as the two forms of ownership are. Possession in its full compass and generic application means *the continuing exercise of any claim or right.*

§ 106. Relation between Possession and Ownership.

"Possession," says Ihering (q), "is the objective realisation of ownership." It is in *fact* what ownership is in *right.* Possession whether of a thing, an interest, or a right, is the *de facto* exercise of a claim; ownership is the *de jure* recognition of one. A thing is owned by me when my claim to it is maintained by the will of the state as expressed in the law; it is possessed by me, when my claim to it is maintained by my own self-assertive will. Ownership is the guarantee of the law; possession is the guarantee of the facts. It is well to have both forms of security if possible; and indeed they normally co-exist. But where there is no law, or where the law is against a man, he must content himself with the precarious security of the facts. Even when the law is in one's favour, it is well to have the facts on one's side also. *Beati possidentes.* Possession, therefore, is the *de facto* counterpart of ownership. It is the external form in which rightful claims normally manifest themselves. The separation of these two things is an exceptional incident, due to accident, wrong, or the special nature of the claims in question. Possession without ownership is the body of fact, uninformed by the spirit of right which usually accompanies it. Ownership without possession is right, unaccompanied by that environment of fact in which it normally realises itself. The two things tend mutually to coincide. Ownership strives to realise itself in possession, and possession endeavours to justify itself as ownership. The law of prescription determines the process by which, through the influence of time, possession without title becomes the mother of ownership, and ownership without possession withers away and dies (r).

(q) Grund des Besitz. p. 179: Der Besitz ist die Thatsächlichkeit des Eigenthums. See also at p. 192: Der Besitz ist die Thatsächlichkeit des Rechts.

(r) In saying that possession is the *de facto* counterpart of ownership, Speaking generally, ownership and possession have the same subject-matter. Whatever may be owned may be possessed, and whatever may be possessed may be owned. This statement, however, is subject to important qualifications. There are claims which may be realised and exercised in fact without receiving any recognition or protection from the law, there being no right vested either in the claimant or in any one else. In such cases there is possession of an interest without the ownership of any right. For example, men might possess copyrights, trade-marks, and other forms of monopoly, even though the law refused to defend those interests as legal rights. Claims to them might be realised *de facto*, and attain some measure of security and value from the facts, without any possibility of support from the law.

Conversely there are many rights which can be owned, but which are not capable of being possessed. They are those which may be termed *transitory*. Rights which do not admit of continuing exercise do not admit of possession either. They cannot be exercised without being thereby wholly fulfilled and destroyed; therefore they cannot be possessed. A creditor, for example, does not possess the debt that is due to him; for this is a transitory right which in its very nature cannot survive its exercise. But a man may possess an easement over land, because its exercise and its continued existence are consistent with each other. It is for this reason that obligations generally (that is to say, rights *in personam* as opposed to *rights in rem*) do not admit of possession. It is to be remembered, however, that *repeated* exercise is equivalent in this respect to *continuing* exercise. I may possess a right of way through repeated acts

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it is to be remembered that we use both terms in their widest sense, as including both the corporeal and incorporeal forms. If we confine our attention to corporeal ownership and possession, the correspondence between them is incomplete. Many claims constitute corporeal possession if exercised *de facto*, but incorporeal ownership if recognised *de jure*. Thus tenants, bailees, and pledgees have corporeal possession but incorporeal ownership. They possess the land or the chattel, but own merely an encumbrance over it. The ownership of a book means the ownership of the *general or residuary right* to it; but the possession of a book means, at most, merely the possession of an *exclusive right to it for the time being*. That is to say, the figurative usage of speech is not the same in possession as in ownership, therefore much corporeal possession is the counterpart of incorporeal ownership.

of use, just as I may possess a right of light or support through continuous enjoyment. Therefore even obligations admit of possession, provided that they are of such a nature as to involve a series of repeated acts of performance. We may say that a landlord is in possession of his rents, an annuitant of his annuity, a bondholder of his interest, or a master of the services of his servant (*s*).

We may note finally that, although incorporeal possession is possible in fact of all continuing rights, it by no means follows that the recognition of such possession, or the attribution of legal consequences to it, is necessary or profitable in law. To what extent incorporeal possession exists in law, and what consequences flow from it, are questions which are not here relevant, but touch merely the details of the legal system.

§ 107. Possessory Remedies.

In English law possession is a good title of right against any one who cannot show a better. A wrongful possessor has the rights of an owner with respect to all persons except earlier possessors and except the true owner himself. Many other legal systems (*t*), however, go much further than this, and treat possession as a provisional or temporary title even against the true owner himself. Even a wrongdoer, who is deprived of his possession, can recover it from any person whatever, simply on the ground of his possession. Even the true owner, who retakes his own, may be forced in this way to restore it to the wrongdoer, and will not be permitted to set up his own superior title to it. He must first give up possession, and then proceed in due course of law for the recovery of the thing on

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(*s*) Windscheid, II. sect. 464: "If we ask what other rights, in addition to real rights, admit of possession, the answer is that in principle no right is incapable of possession, which is capable of continuing exercise (dauernde Ausübung)."

So Ihering, Grund des Besitz. p. 158: "The conception of possession is applicable to all rights which admit of realisation (Thatsächlichkeit), that is to say, which admit of a continuing visible exercise." Ihering defines possession generally (p. 160) as "Thatsächlichkeit der mit dauernder Ausübung verbundenen Rechte." See also Bruns, Recht des Besitzes, pp. 479, 481.

(*t*) See for example the German Civil Code, sects. 858, 861, 864, and the Italian Civil Code, sects. 694—697.

the ground of his ownership. The intention of the law is that every possessor shall be entitled to retain and recover his possession, until deprived of it by a judgment according to law.

Legal remedies thus appointed for the protection of possession even against ownership are called *possessory*, while those available for the protection of ownership itself may be distinguished as *proprietary*. In the modern and medieval civil law the distinction is expressed by the contrasted terms *petitorium* (a proprietary suit) and *possessorium* (a possessory suit).

This duplication of remedies, with the resulting provisional protection of possession, has its beginnings in Roman law. It was taken up into the canon law, where it received considerable extensions, and through the canon law it became a prominent feature of medieval jurisprudence. It is still received in modern Continental systems; but although well known to the earlier law of England, it has been long since rejected by us as cumbrous and unnecessary.

There has been much discussion as to the reasons on which this provisional protection of possession is based. It would seem probable that the considerations of greatest weight are the three following.

1. The evils of violent self-help are deemed so serious that it must be discouraged by taking away all advantages which any one derives from it. He who helps himself by force even to that which is his own must restore it even to a thief. The law gives him a remedy, and with it he must be content. This reason, however, can be allowed as valid only in a condition of society in which the evils and dangers of forcible self-redress are much more formidable than they are at the present day. It has been found abundantly sufficient to punish violence in the ordinary way as a criminal offence, without compelling a rightful owner to deliver up to a trespasser property to which he has no manner of right, and which can be forthwith recovered from him by due course of law. In the case of chattels, indeed, our law has not found it needful to protect possession even to this extent. It seems that an owner who retakes a chattel by force acts within his legal rights. Forcible entry upon land, however, is a criminal offence.

2. A second reason for the institution of possessory remedies is to be found in the serious imperfections of the early proprietary remedies. The procedure by which an owner recovered his property was cumbrous, dilatory, and inefficient. The path of the claimant was strewn with pitfalls, and he was lucky if he reached his destination without disaster. The part of plaintiff in such an action was one of grave disadvantage, and possession was nine points of the law. No man, therefore, could be suffered to procure for himself by violence the advantageous position of defendant, and to force his adversary by such means to assume the dangerous and difficult post of plaintiff. The original position of affairs must first be restored; possession must first be given to him who had it first; then, and not till then, would the law consent to discuss the titles of the disputants to the property in question. Yet however cogent such considerations may have been in earlier law, they are now of little weight. With a rational system of procedure the task of the plaintiff is as easy as that of the defendant. The law shows no favour to one rather than to the other.

3. A third reason for possessory remedies, closely connected with the second, is the difficulty of the proof of ownership. It is easy to prove that one has been in possession of a thing, but difficult (in the absence of any system of registration of title) to prove that one is the owner of it. Therefore it was considered unjust that a man should be allowed by violence to transfer the heavy burden of proof from his own shoulders to those of his opponent. Every man should bear his own burden. He who takes a thing by force must restore it to him from whom he has taken it; let him then prove, if he can, that he is the owner of it; and the law will then give to him what it will not suffer him to take for himself. But English law has long since discovered that it is possible to attain this end in a much more satisfactory and reasonable way. It adjusts the burden of proof of ownership with perfect equity, without recourse to any such anomaly as the protection of the possessor against the owner. This it does by the operation of the three following rules:

1. Prior possession is *primâ facie* proof of title. Even in

the ordinary proprietary action a claimant need do nothing more than prove that he had an older possession than that of the defendant; for the law will presume from this prior possession a better title. *Qui prior est tempore potior est jure.*

2. A defendant is always at liberty to rebut this presumption by proving that the better title is in himself.

3. A defendant is not allowed to set up the defence of *jus tertii*, as it is called; that is to say, he will not be heard to allege, as against the plaintiff's claim, that neither the plaintiff nor he himself, but some third person, is the true owner. Let every man come and defend his own title. As between A. and B. the right of C. is irrelevant.

By the joint operation of these three rules the same purpose is effected as was sought in more cumbrous fashion by the early duplication of proprietary and possessory remedies (*u*).

SUMMARY OF CHAPTERS XIII. AND XIV.

Possession
  - In fact—possessio naturalis.
  - In law—possessio civilis.

Possession in law
  - Seisin.
  - Possession.

Possession
  - Corporeal—possessio corporis—Sachenbesitz.
  - Incorporeal—possessio juris—Rechtsbesitz.

Corporeal possession—the continuing exercise of a claim to the exclusive use of a material thing.

Elements of corporeal possession
  - Animus sibi habendi.
  - Corpus.

Animus sibi habendi:
  1. Not necessarily a claim of right.
  2. Must be exclusive.
  3. Not necessarily a claim to use as owner.
  4. Not necessarily a claim on one's own behalf.
  5. Not necessarily specific.

Corpus—the effective realisation of the animus in a security for enjoyment.

Elements of the corpus:
  1. A relation of the possessor to other persons, amounting to a security for their non-interference.

(*u*) *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Armory* v. *Delamirie*, 1 Stra. 504; 1 Sm. L. C. 10th ed. 343; *Bridges* v. *Hawkesworth*, 21 L. J. Q. B. 75.

The grounds of such security:
  1. Physical power.
  2. Personal presence.
  3. Secrecy.
  4. Custom.
  5. Respect for rightful claims.
  6. Manifestation of the *animus*.
  7. Protection afforded by other possessions.
     The rights of a finder.

2. A relation of the possessor to the thing possessed, amounting to a security for the use of the thing at will.

Possession
- Immediate—without the intervention of another person.
- Mediate—through or by means of another person.

Mediate possession
- 1. Through servants or agents.
- 2. Through bailees or tenants at will.
- 3. Through persons claiming temporary possession for themselves.

The relation between the mediate and the immediate possessor.

The exclusiveness of possession.
  Exceptional instances of duplicate possession:
    1. Mediate and immediate possession.
    2. Possession in common.
    3. Corporeal and incorporeal possession.

The acquisition of possession:
- 1. Taking.
- 2. Delivery
  - Actual.
  - Constructive
    - Traditio brevi manu.
    - Constitutum possessorium.
    - Attornment.

Possession not essentially the physical power of exclusion.

Incorporeal possession:
  Its nature—the continuing exercise of any claim, save one to the exclusive use of a corporeal thing.
  Its relation to corporeal possession.

The generic conception of possession.

The relation between possession and ownership.
  Possession the *de facto* exercise of a claim.
  Ownership the *de jure* recognition of one.

The identity of the objects of ownership and possession.
  Exceptions:
    1. Things which can be possessed, but cannot be owned.
    2. Things which can be owned, but cannot be possessed.

Possessory remedies:
  1. Their nature.
  2. Their objects.
  3. Their exclusion from English law.

CHAPTER XV.

PERSONS.

§ 108. The Nature of Personality.

The purpose of this chapter is to investigate the legal conception of personality. It is not permissible to adopt the simple device of saying that a person means a human being, for even in the popular or non-legal use of the term there are persons who are not men. Personality is a wider and vaguer term than humanity. Gods, angels, and the spirits of the dead are persons, no less than men are. And in the law this want of coincidence between the class of persons and that of human beings is still more marked. In the law there may be men who are not persons; slaves, for example, are destitute of legal personality in any system which regards them as incapable of either rights or liabilities. Like cattle, they are things and the objects of rights; not persons and the subjects of them. Conversely there are, in the law, persons who are not men. A joint-stock company or a municipal corporation is a person in legal contemplation. It is true that it is only a fictitious, not a real person; but it is not a fictitious *man*. It is personality, not human nature, that is fictitiously attributed by the law to bodies corporate.

So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man. Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance, and this is the exclusive point of view from which personality receives legal recognition.

Persons as so defined are of two kinds, distinguishable as natural and legal. A natural person is a being to whom the law attributes personality in accordance with reality and truth. Legal persons are beings, real or imaginary, to whom the law attributes personality by way of fiction, when there is none in fact. Natural persons are persons in fact as well as in law; legal persons are persons in law but not in fact (*x*).

§ 109. The Legal Status of the Lower Animals.

The only natural persons are human beings. Beasts are not persons. They are merely things—often the objects of legal rights and duties, but never the subjects of them. Beasts, like men, are capable of acts and possess interests. Yet their acts are neither lawful nor unlawful; they are not recognised by the law as the appropriate subject-matter either of permission or of prohibition. Archaic codes did not scruple, it is true, to punish with death in due course of law the beast that was guilty of homicide. "If an ox gore a man or a woman that they die: then the ox shall be surely stoned and his flesh shall not be eaten" (*y*). A conception such as this pertains to a stage that is long since past; but modern law shows us a relic of it in the rule that the owner of a beast is liable for its trespasses, just as a master must answer for his servant, or a slave-owner for his slave (*z*). This vicarious liability, however, does not involve any legal recognition of the personality of the animal whose misdeeds are thus imputed to its owner.

A beast is as incapable of legal rights as of legal duties, for its interests receive no recognition from the law. *Hominum*

(*x*) Legal persons are also termed fictitious, juristic, artificial, or moral.

(*y*) Exodus xxi. 28. To the same effect see Plato's Laws, 873.

(*z*) *Ellis* v. *Loftus Iron Company*, L. R. 10 C. P. at p. 13: "In the case of animals trespassing on land the mere act of the animal belonging to a man which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act if done by himself would have been a trespass." Cf. Just. Inst. iv. 9.

causa omne jus constitutum (*a*). The law is made for men, and allows no fellowship or bonds of obligation between them and the lower animals. If these last possess moral rights—as utilitarian ethics at least need not scruple to admit—those rights are not recognised by any legal system. That which is done to the hurt of a beast may be a wrong to its owner or to the society of mankind, but it is no wrong to the beast. No animal can be the owner of any property, even through the medium of a human trustee. If a testator vests property in trustees for the maintenance of his favourite horses or dogs, he will thereby create no valid trust enforceable in any way by or on behalf of these non-human beneficiaries. The only effect of such provisions is to authorise the trustees, if they think fit, to expend the property or any part of it in the way so indicated; and whatever part of it is not so spent will go to the testator's representatives as undisposed of (*b*).

There are, however, two cases in which beasts may be thought to possess legal rights. In the first place, cruelty to animals is a criminal offence, and in the second place, a trust for the benefit of particular classes of animals, as opposed to one for individual animals, is valid and enforceable as a public and charitable trust; for example, a provision for the establishment and maintenance of a home for stray dogs or broken-down horses (*c*). Are we driven by the existence of these cases to recognise the legal rights and therefore the legal personality of beasts? There is no occasion for any such conflict with accustomed modes of thought and speech. These duties towards animals are conceived by the law as duties towards society itself. They correspond not to private rights vested in the immediate beneficiaries, but to public rights vested in the community at large—for the community has a rightful interest, legally recognised to this extent, in the well-being even of the dumb animals which belong to it.

(*a*) D. 1. 5. 2.
(*b*) *In re Dean*, 41 Ch. D. 552.
(*c*) *Ibid.* p. 557.

§ 110. The Legal Status of Dead Men.

Dead men are no longer persons in the eye of the law. They have laid down their legal personality with their lives, and are now as destitute of rights as they are free from liabilities. They have no rights because they have no interests. There is nothing that concerns them any longer. " neither have they any more a portion for ever in anything that is done under the sun." They do not even remain the owners of their property until their successors enter upon their inheritance. We have already seen how, in the interval between death and the entering of the heir, Roman law preferred to personify the inheritance itself, rather than attribute any continued legal personality or ownership to the dead man (*d*). So in English law the goods of an intestate, before the grant of letters of administration, have been vested in the bishop of the diocese or in the judge of the Court of Probate, rather than left to the dead until they are in truth acquired by the living.

Yet although all a man's rights and interests perish with him, he does when alive concern himself much with that which shall become of him and his after he is dead. And the law, without conferring rights upon the dead, does in some degree recognise and take account after a man's death of his desires and interests when alive. There are three things, more especially, in respect of which the anxieties of living men extend beyond the period of their lives, in such sort that the law will take notice of them. These are a man's body, his reputation, and his estate. By a natural illusion a living man deems himself interested in the treatment to be awarded to his own dead body. To what extent does the law secure his desires in this matter? A corpse is the property of no one. It cannot be disposed of by will or any other instrument (*e*), and no wrongful dealing with it can amount to theft (*f*). The criminal law, however, secures decent burial for all dead men,

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(*d*) Hereditas personae vice fungitur. D. 46. 1. 22. Creditum est hereditatem dominam esse, defuncti locum obtinere. D. 28. 5. 31. 1.

(*e*) *Williams* v. *Williams*, 20 Ch. D. 659.

(*f*) *R.* v. *Raynes*, 2 East, P. C. 652.

and the violation of a grave is a criminal offence (*g*). "Every person dying in this country," it has been judicially declared (*h*), "has a right to Christian burial." On the other hand the testamentary directions of a man as to the disposal of his body are without any binding force (*i*), save that by statute he is given the power of protecting it from the indignity of anatomical uses (*j*). Similarly a permanent trust for the maintenance of his tomb is illegal and void, this being a purpose to which no property can be permanently devoted (*k*). Even a temporary trust for this purpose (not offending against the rule against perpetuities) has no other effect than that already noticed by us as attributed to trusts for animals, its fulfilment being lawful but not obligatory (*l*). Property is for the uses of the living, not of the dead.

The reputation of the dead receives some degree of protection from the criminal law. A libel upon a dead man will be punished as a misdemeanour—but only when its publication is in truth an attack upon the interests of living persons. The right so attacked and so defended is in reality not that of the dead, but that of his living descendants. To this extent, and in this manner only, has the maxim *De mortuis nil nisi bonum* obtained legal recognition and obligation (*m*).

By far the most important matter, however, in which the desires of dead men are allowed by the law to regulate the actions of the living is that of testamentary succession. For many years after a man is dead, his hand may continue to regulate and determine the disposition and enjoyment of the property which he owned while living. This, however, is a matter which will receive attention more fitly in another place.

(*g*) *Foster* v. *Dodd*, L. R. 3 Q. B. at p. 77: "Whether in ground consecrated or unconsecrated indignities offered to human remains in improperly and indecently disinterring them, are the ground of an indictment."

(*h*) *R.* v. *Stewart*, 12 Ad. & El. 777. As to the lawfulness of cremation, see *Reg.* v. *Price*, 12 Q. B. D. 247.

(*i*) *Williams* v. *Williams*, 20 Ch. D. 659.

(*j*) 2 & 3 Wm. IV. c. 75, s. 7.

(*k*) *In re Vaughan*, 33 Ch. D. 187; *Hoare* v. *Osborne*, 1 Eq. 587.

(*l*) *In re Dean*, 41 Ch. D. 557.

(*m*) 5 Co. Rep. 125 a; *R.* v. *Labouchere*, 12 Q. B. D. 320; Stephen's Digest of Criminal Law, sect. 291, 5th ed.

§ 111. The Legal Status of Unborn Persons.

Though the dead possess no legal personality, it is otherwise with the unborn. There is nothing in law to prevent a man from owning property before he is born. His ownership is necessarily contingent, indeed, for he may never be born at all; but it is none the less a real and present ownership. A man may settle property upon his wife and the children to be born of her. Or he may die intestate, and his unborn child will inherit his estate. Yet the law is careful lest property should be too long withdrawn in this way from the uses of living men in favour of generations yet to come; and various restrictive rules have been established to this end. No testator could now direct his fortune to be accumulated for a hundred years and then distributed among his descendants.

A child in its mother's womb is for many purposes regarded by a legal fiction as already born, in accordance with the maxim, *Nasciturus pro jam nato habetur.* In the words of Coke: "The law in many cases hath consideration of him in respect of the apparent expectation of his birth" (*n*).

To what extent an unborn person can possess personal as well as proprietary rights is a somewhat unsettled question. It has been held that a posthumous child is entitled to compensation under Lord Campbell's Act for the death of his father (*o*). Wilful or negligent injury inflicted on a child in the womb, by reason of which it dies after having been born alive, amounts to murder or manslaughter (*p*). A pregnant woman condemned to death is respited as of right, until she has been delivered of her child. On the other hand, in a case in which a claim was made by a female infant against a railway company for injuries inflicted upon her while in her mother's womb through a collision due to the defendant's negligence, it was held by an Irish court that no cause of

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(*n*) 7 Co. Rep. 8 b. Compare D. 1. 5. 26: Qui in utero sunt in toto paene jure civili intelleguntur in rerum natura esse.

(*o*) *The George and Richard*, L. R. 3 Ad. & Ecc. 466.

(*p*) *R.* v. *Senior*, 1 Moody, C. C. 344; *R.* v. *West*, 2 Car. & Kir. 784.

action was disclosed (q). The decision of two of the four judges, however, proceeded upon the ground that the company owed no duty of care towards a person whose existence was unknown to them, and not upon the ground that an unborn child has in no case any right of immunity from personal harm.

The rights of an unborn person, whether proprietary or personal, are all contingent on his birth as a living human being. The legal personality attributed to him by way of anticipation falls away *ab initio* if he never takes his place among the living. Abortion is a crime; but it is not homicide, unless the child is born alive before he dies. A posthumous child may inherit; but if he dies in the womb, or is stillborn, his inheritance fails to take effect, and no one can claim through him, though it would be otherwise if he lived for an hour after his birth.

§ 112. Double Personality.

It often happens that a single human being possesses a double personality. He is one man, but two persons. *Unus homo*, it is said, *plures personas sustinet*. In one capacity, or in one right as English lawyers say, he may have legal relations with himself in his other capacity or right. He may contract with himself, or owe money to himself, or transfer property to himself. Every contract, debt, obligation, or assignment requires two persons; but those two persons may be the same human being. This double personality exists chiefly in the case of trusteeship. A trustee is, as we have seen, a person in whom the property of another is nominally, *i.e.*, technically, vested, to the intent that he may represent that other in the management and protection of it. A trustee, therefore, is for many purposes two persons in the eye of the law. In right of his beneficiary he is one person, and in his own right he is another. In the one capacity he may owe money to himself in the other. In the one capacity he may own an encumbrance over property which belongs to himself in the other. He may be his own creditor, or his own landlord; as where a testator appoints one of his creditors as his executor, or makes one of his tenants the trustee of his land (*r*). In all such cases, were it not for the recognition of double personality, the obligation or encumbrance would be destroyed by merger, or *confusio* as the Romans called it, for two persons at least are requisite for the existence of a legal relation. No man can in his own right be under any obligation to himself, or own any encumbrance over his own property. *Nulli res sua servit* (*s*).

(q) *Walker* v. *Great Northern Ry. Co. of Ireland*, 28 L. R. Ir. 69.

§ 113. Legal Persons.

A legal person is any subject-matter to which the law attributes a merely legal or fictitious personality. This extension, for good and sufficient reasons, of the conception of personality beyond the limits of fact—this recognition of persons who are not men—is one of the most noteworthy feats of the legal imagination, and the true nature and uses of it will form the subject of our consideration during the remainder of this chapter.

The law, in creating legal persons, always does so by personifying some real thing. Such a person has to this extent a real existence, and it is his personality alone that is fictitious. There is, indeed, no theoretical necessity for this, since the law might, if it so pleased, attribute the quality of personality to a purely imaginary being, and yet attain the ends for which this fictitious extension of personality is devised. Personification, however, conduces so greatly to simplicity of thought and speech, that its aid is invariably accepted. The thing personified may be termed the *corpus* of the legal person so created (*t*); it is the body into which the law infuses the *animus* of a fictitious personality.

Although all fictitious or legal personality involves personification, the converse is not true. Personification in itself

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(*r*) The maxim of the law is : Quum duo jura in una persona concurrunt, aequum est ac si essent in duobus. *Calvin's Case*, 2 State Trials, 584. *Coppin* v. *Coppin*, 2 P. W. 295.

(*s*) D. 8. 2. 26.

(*t*) German writers term it the *substratum* or *Unterlage* of the fictitious person. Windscheid, I. sect. 57. Vangerow, I. sect. 53. Puchta, II. 192.

is a mere metaphor, not a legal fiction. Legal personality is a definite legal conception; personification, as such, is a mere artifice of speech devised for compendious expression. In popular language, and in legal language also, when strictness of speech is not called for, the device of personification is extensively used. We speak—and it may be that sometimes we even think—of the estate of a deceased person as if it were itself a person. We say that it owes debts, or has debts owing to it, or is insolvent. The law, however, recognises no legal personality in such a case. The rights and liabilities of a dead man devolve upon his heirs, executors, and administrators, not upon any fictitious person known as his estate. Similarly we speak of a piece of land as entitled to a servitude, such as a right of way over another piece. So, also, in the case of common interests and actions, we personify as a single person the group of individuals concerned, even though the law recognises no body corporate. We speak of a firm as a person distinct from the individual partners. We speak of a jury, a bench of judges, a public meeting, the community itself, as being itself a person instead of merely a group or society of persons. But legal personality is not reached until the law recognises, over and above the associated individuals, a fictitious being which in a manner represents them, but is not identical with them.

Legal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases. Those which are actually recognised by our own system, however, all fall within a single class, namely, corporations or bodies corporate. A corporation is a group or series of persons which by a legal fiction is regarded and treated as itself a person. If, however, we take account of other systems than our own, we find that the conception of legal personality is not so limited in its application, and that there are at least three distinct varieties. They are distinguished by reference to the different kinds of things which the law selects for personification.

1. The first class of legal persons consists of corporations, as already defined, namely, those which are constituted by the personification of groups or series of individuals. The indi-

viduals who thus form the *corpus* of the legal person are termed its *members*. We shall consider this form of fictitious personality more particularly in the sequel.

2. The second class is that in which the *corpus*, or object selected for personification, is not a group or series of persons, but an institution. The law, if it pleases, may (as popular thought perhaps fairly readily does) regard a church or a hospital, or a university, or a library, as a person. That is to say, it may attribute personality, not to any group of persons connected with the institution, but to the institution itself. Our own law does not, indeed, so deal with the matter. The person known to the law of England as the University of London is not the institution that goes by that name, but a personified and incorporated aggregate of human beings, namely, the chancellor, vice-chancellor, fellows, and graduates. It is well to remember, however, that notwithstanding this tradition and practice of English law, fictitious personality is not limited by any logical necessity, or, indeed, by any obvious requirement of expediency, to the incorporation of bodies of individual persons (*u*).

3. The third kind of legal person is that in which the *corpus* is some fund or estate devoted to special uses—a charitable fund, for example, or a trust estate, or the property of a dead man or of a bankrupt. Here, also, English law prefers the process of incorporation. If it chooses to personify at all, it personifies, not the fund or the estate, but the body of persons who administer it. Yet the other way is equally possible, and may be equally expedient. The choice of the *corpus* into which the law shall breathe the breath of a fictitious personality is a matter of form rather than of substance, of lucid and compendious expression rather than of legal principle.

(*u*) Occasionally in the statute book we find so-called corporations which are in truth not corporations at all—having no incorporated members—but are merely personified institutions. The Commonwealth Bank of Australia constituted by an Act of the Federal Parliament of Australia, is an example. See the Commonwealth Bank Act, 1911, s. 5 : "A Commonwealth Bank, to be called the Commonwealth Bank of Australia, is hereby established." Sect. 6 : "The Bank shall be a body corporate with perpetual succession and a common seal, and may hold land, and may sue and be sued in its corporate name."

§ 114. Corporations.

We have now to consider more particularly the nature and purposes of the legal conception of incorporation, inasmuch as legal personality goes no further than this in English law. Much of what is said in this special connection, however, will be applicable *mutatis mutandis* to the other classes of legal persons also.

Corporations are of two kinds, distinguished in English law as corporations aggregate and corporations sole. "Persons," says Coke (*x*), "are of two sorts, persons natural created of God, . . . and persons incorporate or politique created by the policy of man (and therefore they are called bodies politique); and those be of two sorts, viz., either sole, or aggregate of many." A corporation aggregate is an incorporated *group* of co-existing persons, and a corporation sole is an incorporated *series* of successive persons. The former is that which has several members at a time, while the latter is that which has only one member at a time. Corporations aggregate are by far the more numerous and important. Examples are a registered company, consisting of all the shareholders, and a municipal corporation, consisting of the inhabitants of the borough. Corporations sole are found only when the successive holders of some public office are incorporated so as to constitute a single, permanent, and legal person. The Sovereign, for example, is a corporation of this kind at common law, while the Postmaster-General (*y*), the Solicitor to the Treasury (*z*), and the Secretary of State for War (*a*) have been endowed by statute with the same nature (*b*).

It is essential to recognise clearly the element of legal fiction involved in both those forms of incorporation, for this

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(*x*) Co. Litt. 2 a.

(*y*) 8 Ed. VII. c. 48, s. 33.

(*z*) 39 & 40 Vict. c. 18, s. 1.

(*a*) 18 & 19 Vict. c. 117, s. 2.

(*b*) Corporations sole are not a peculiarity of English law. The distinction between the two forms of incorporation is well known to foreign jurists. See Windscheid, I. sect. 57. Vangerow, I. sect. 53. The English law as to corporations sole is extremely imperfect and undeveloped, but the conception itself is perfectly logical, and is capable of serious and profitable uses. Maitland has traced the history of this branch of the law in two articles in the L. Q. R. XVI., p. 335, and XVII., p. 131.

has been made by some writers a matter of dispute. A company is in law something different from its shareholders or members (*c*). The property of the company is not in law the property of the shareholders. The debts and liabilities of the company are not attributed in law to its members. The company may become insolvent, while its members remain rich. Contracts may be made between the company and a shareholder, as if between two persons entirely distinct from each other. The shareholders may become so reduced in number that there is only one of them left; but he and the company will be distinct persons for all that (*d*).

May we not go further still, and say that a company is capable of surviving the last of its members? At common law indeed, a corporation is dissolved by the death of all its members (*e*). There is, however, no logical necessity for any such rule, and it does not apply to corporations sole, for beings of this sort lead a continuous life, notwithstanding the intervals between the death or retirement of each occupant of the office and the appointment of his successor. Nor is there any reason to suppose that such a ground of dissolution is known to the trading corporations which are incorporated under the Companies Acts. Being established by statute, they can be dissolved only in manner provided by the statute to which they owe their origin (*f*). The representatives of a deceased shareholder are not themselves members of the company, unless they become registered as such with their own consent. If, therefore, on the death of the last surviving members of a private company, their executors refuse or neglect to be registered in their stead, the company will no longer have any members. Is it, for that reason, *ipso jure* dissolved? If not, it is clear that since a company can survive its members and

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(*c*) Savigny, System, sect. 90: "The aggregate of the members who compose a corporation differs essentially from the corporation itself." *The Great Eastern Ry. Co.* v. *Turner*, L. R. 8 Ch. at p. 152: "The Company is a mere abstraction of law." *Flitcroft's Case*, 21 Ch. D. at p. 536: "The corporation is not a mere aggregate of shareholders." *Solomon* v. *Solomon & Co.*, (1897) A. C. at p. 51: "The company is at law a different person altogether from the subscribers to the memorandum."

(*d*) D. 3. 4. 7. 2. Cum jus omnium in unum reciderit, et stet nomen universitatis. *Universitas* is the generic title of a corporation in Roman law, a title retained to this day in the case of that particular form of corporation which we know as a university.

(*e*) Blackstone, I. 485.

(*f*) Lindley on Companies, II. p. 822 (6th ed.): "A company which is incorporated by act of parliament can be dissolved only as therein provided, or by another act of parliament."

exist without them, it must be something entirely distinct from them (*g*).

In all those respects a corporation is essentially different from an unincorporated partnership. A firm is not a person in the eye of the law; it is nothing else than the sum of its individual members. There is no fictitious being, standing over against the partners, as a company stands over against its shareholders. The property and debts of the firm are nothing else than those of the partners. A change in the list of partners is the substitution of a new firm for the old one, and there is no permanent legal unity, as in the case of the company. There can be no firm which consists of one partner only, as a company may consist of one member. The incorporation of a firm—that process by which an ordinary partnership is transmuted into a company—effects a fundamental change in the legal relations of its members. It is nothing less than the birth of a new being, to whom the whole business and property of the partnership is transferred—a being without soul or body, not visible save to the eye of the law, but of a kind whose power and importance, wealth and activity, are already great, and grow greater every day.

In the case of corporations sole, the fictitious nature of their personality is equally apparent. The chief difficulty in apprehending the true nature of a corporation of this description is that it bears the same name as the natural person who is its sole member for the time being, and who represents it and acts for it. Each of them is the Sovereign, or the Solicitor to the Treasury, or the Secretary of State for War. Nevertheless under each of these names two persons live. One is a human being, administering for the time being the duties and affairs of the office. He alone is visible to the eyes of laymen. The other is a mythical being whom only lawyers know of, whom only the eye of the law can perceive, and who lives, indeed, only in the world of legal notions. He is the true occupant of the office; he never dies or retires; the other, the person of flesh and blood, is merely his agent and

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(*g*) That a corporation may survive the last of its members is admitted by Savigny (System, sect. 89), and Windscheid (I. sect. 61).

representative, through whom he performs his functions. The living official comes and goes, but this offspring of the law remains the same for ever.

The doctrine that corporations are *personae fictae*, though generally received, has not passed unchallenged. Attempts have been made in recent years, especially by German jurists, to establish in place of it a new theory which regards corporate personality as a reality, and not a fictitious construction of the law. A corporation, it is said, is nothing more, in law or in fact, than the aggregate of its members conceived as a unity, and this unity, this organisation of human beings, is a real person and a living organism, possessed of a real will of its own, and capable of actions and of responsibility for them, just as a man is.

With respect to this theory it is to be observed that, even if applicable to corporations aggregate, it must leave corporations sole and the other classes of legal persons to be explained in the older fashion. And even in the case of corporations aggregate it seems impossible to admit that their personality is anything more than an example of the law's employment of metaphor and fiction. A society is not a person, but a number of persons. The so-called will of a company is in reality nothing but the legal resultant of an expression of the wills of a majority of its directors or shareholders. Ten men do not become in fact one person, because they associate themselves together for one end, any more than two horses become one animal when they draw the same cart. The apparent absurdity in holding that a rich and powerful joint-stock company is a mere fiction of the law, and possesses no real existence, is suggested not by the fiction-theory, but by a misunderstanding of it. No one denies the reality of the composite company (that is to say, the group of shareholders). What is in truth denied is the reality of that unitary notional entity which may in law survive the last of them. A group or society of men is a very real *thing*, but it is only a fictitious *person* (*h*).

(*h*) The leading advocate of this realistic theory is Gierke (Die Genossenschaftstheorie, 1887. Deutches Privatrecht, 1895). See also Dernburg, Pandekten, I. sect. 59, and Mestre, Les Personnes Morales, 1889. In England it has received sympathetic exposition, if not express support from Maitland in the Introduction to his translation of part of Gierke's Genossenschaftsrecht (Political Theories of the Middle Ages, 1900). See also, to the same effect, Pollock, Jurisprudence, p. 113, 2nd ed., and L. Q. R. vol. 27, p. 219; Brown, Austinian Theory of Law, Excursus A; 22 L. Q. R. 178, The Legal Personality of a Foreign Corporation, by E. H. Young. Savigny and Windscheid are representative adherents of the older doctrine. For further discussions of this question see Harvard Law Review, vol. xxiv. pp. 253, 347 (Corporate Personality, by A. W Machen); Law Quarterly Review, vol. xxvii. p. 90 (Legal Personality, by Prof. W. M. Geldart); Gray's Nature and Sources of the Law, ch. 2; Saleilles, De la personnalité juridique.

§ 115. The Agents, Beneficiaries, and Members of a Corporation.

Although corporations are fictitious persons, the acts and interests, rights and liabilities, attributed to them by the law are those of real or natural persons, for otherwise the law of corporations would be destitute of any relation to actual fact and of any serious purpose. Every corporation, therefore, involves in the first place some real person or persons whose interests are fictitiously attributed to it, and in the second place some real person or persons whose acts are fictitiously imputed to it. A corporation, having neither soul nor body, cannot act save through the agency of some representative in the world of real men. For the same reason it can have no interests, and therefore no rights, save those which are attributed to it as a trustee for or otherwise on behalf of actual human beings (*i*). Whatever a company is reputed to do in law is done in fact by the directors or the shareholders as its agents and representatives. Whatever interests, rights, or property it possesses in law are in fact those of its shareholders, and are held by it for their benefit. Every legal person, therefore, has corresponding to it in the world of natural persons certain agents or representatives by whom it acts, and certain beneficiaries on whose behalf it exists and fulfils its functions. Its representatives may or may not be different persons from its beneficiaries, for these two capacities may or may not be united in the same individuals. The shareholders of a company are not merely the persons for whose benefit it exists; they are also those by whom it acts. In the case of a corporation established for charitable purposes it is otherwise, for the beneficiaries may have no share whatever in the management of its affairs.

(*i*) The relation between a corporation and its beneficiaries may or may not amount to a *trust* in the proper sense of the term. A share in a company is not the beneficial ownership of a certain proportion of the company's property, but the benefit of a contract made by the shareholder with the company, under which he is entitled to be paid a share of the profits made by the company, and of the surplus assets on its dissolution. A share is a chose in action—an *obligation* between the company and the shareholder. *Colonial Bank* v. *Whinney*, 11 A. C. 426.

The representatives and beneficiaries of a corporation must not be confounded with its members. These last are, as we have seen, the individuals who form the group or series personified by the law, and who so constitute the *corpus* or body of the fictitious person thus created. Membership of a corporation does not in itself affect in any way the rights or liabilities of the members, for it is nothing more than a matter of form. A man's privileges and responsibilities in respect of a corporation depend on whether he is one of its representatives or beneficiaries, not on whether he is formally accounted by the law as one of its members. Municipal corporations are constituted by the incorporation of the inhabitants of boroughs; but if by statute it were declared that they should consist for the future of the mayor, aldermen, and councillors, the change would not affect the rights, powers, or liabilities of any human being.

The extent to which the three classes of persons with whom a corporation is concerned, namely its members, its representatives, and its beneficiaries, are coincident and comprise the same persons, is a matter to be determined as the law thinks fit in the particular case. The members of a corporation may or may not be those by whom it acts, and they may or may not be those on whose behalf it exists.

It is worth notice that some or all of the members of a corporation may be corporations themselves. There is nothing to prevent the shares of a company from being held by other companies. In this case the fiction of incorporation is duplicated, and the law creates a fictitious person by the personification of a group of persons who themselves possess a merely legal and artificial personality.

§ 116. The Acts and Liabilities of a Corporation.

When a natural person acts by an agent, the authority of the agent is conferred, and its limits are determined, by the will and consent of the principal. In general only those acts of the agent are imputed by the law to the principal, which are within the limits of the agent's authority as thus created and circumscribed. But in the case of a corporation it is necessarily otherwise. A legal person is as incapable of conferring authority upon an agent to act on its behalf, as of doing the act *in propria persona*. The authority of the agents and representatives of a corporation is therefore conferred, limited, and determined, not by the consent of the principal, but by the law itself. It is the law that determines who shall act for a corporation, and within what limits his activity must be confined. Any act which lies beyond these legally appointed limits will not be imputed to the corporation, even though done in its name and on its behalf. It is said to be *ultra vires* of the corporation, and as a corporate act it is null and void.

Speaking generally, we may say that a corporation can do those things only which are incidental to the fulfilment of the purposes for which the law created it. All its acts must be directed to its legally appointed end. Thus the memorandum of association of a company must set forth the purposes for which it is established; and even the unanimous consent of the whole body of shareholders cannot effectively enable the company to act beyond the limits so marked out for its activity.

It is well settled in the law of England that a corporation may be held liable for wrongful acts, and that this liability extends even to those cases in which malice, fraud, or other wrongful motive or intent is a necessary element. A company may be sued for libel, malicious prosecution, or deceit (*k*). Nor is this responsibility civil only. Corporations, no less than men, are within reach of the arm of the criminal law. They may be indicted or otherwise prosecuted for a breach of their statutory duties, and punished by way of fine and forfeiture (*l*).

Although this is now established law, the theoretical basis of the liability of corporations is a matter of some difficulty and debate. For in the first place it may be made a question whether such liability is consistent with natural justice. To punish a body corporate, either criminally or by the enforcement of penal redress, is in practice to punish the beneficiaries

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(*k*) *Cornford* v. *Carlton Bank*, (1899) 1 Q. B. 392; (1900) 1 Q. B. 22.

(*l*) *Reg.* v. *Birmingham and Gloucester Ry. Coy.*, 3 Q. B. 223; *Reg.* v. *Great North of England Ry. Co.*, 9 Q. B. 315.

on whose behalf its property is held, for the acts of the agents by whom it fulfils its functions. So far, therefore, as the beneficiaries and the agents are different persons, the liability of bodies corporate is in effect an instance of vicarious responsibility, and it is to be justified on the same principles as are applicable to the vicarious liability of a principal for the unauthorised acts of his agent—principles which will be considered by us at a later stage of our enquiry. For although the representatives of a corporation are in form and legal theory the agents of that fictitious person, yet in substance and fact they are the agents of the beneficiaries. A company is justly held liable for the acts of its directors, because in truth the directors are the servants of the shareholders.

A more serious difficulty in imposing liability upon bodies corporate arises from the following consideration. The wrongful acts so attributed by the law to fictitious persons are in reality the acts of their agents. Now we have already seen that the limits of the authority of those agents are determined by the law itself, and that acts beyond those limits will not be deemed in law to be the acts of the corporation How, then, can an illegal act be imputed to a corporation? If illegal, it cannot be within the limits of lawful authority; and if not within these limits, it cannot be the act of the corporation. The solution of this difficulty is twofold. In the first place, the argument does not extend to wrongful acts of *omission*, for these may be considered as done by the body politic in person, and not merely by its representatives. No fictitious person can do in person what by law it ought not to do, but it can in person fail to do what in law it ought. And in the second place, the liability of a corporation for the acts of its representatives is a perfectly logical application of the law as to an employer's liability for his servants. The responsibility of a master does not depend on any authority given to his servant to commit the wrongful act. It is the outcome of an absolute rule of law that the employer is himself answerable for all wrongs committed by his servant in the course and process of doing that which he is employed to do. I am liable for the negligence of my servant in driving my carriage, not because I authorised him to be negligent, but because I authorised him to drive the carriage. So in the case of the agents of a corporation: the law imputes to the corporation not only all acts which its agents are lawfully authorised to do, but all unlawful acts which they do in or about the business so authorised. The corporation is responsible not only for what its agents do, being thereunto lawfully authorised, but also for the manner in which they do it. If its agents do negligently or fraudulently that which they might have done lawfully and with authority, the law will hold the corporation answerable (*m*).

§ 117. The Uses and Purposes of Incorporation.

There is probably nothing which the law can do by the aid of the conception of incorporation, which it could not do without it. But there are many things which it can by such aid do better and more easily than would otherwise be possible. Among the various reasons for admitting this fictitious extension of personality, we may distinguish one as of general and fundamental importance, namely, the difficulty which the law finds in dealing with common interests vested in large numbers of individuals and with common action in the management and protection of such interests. The normal state of things —that with which the law is familiar, and to which its principles are conformed—is individual ownership. With a single individual the law knows well how to deal, but common ownership is a source of serious and manifold difficulties. If two persons carry on a partnership, or own and manage property in common, complications arise, with which nevertheless the law can deal without calling in the aid of fresh conceptions. But what if there are fifty or a hundred joint-owners? With such a state of facts legal principles and conceptions based on the type of individual ownership are scarcely competent to deal. How shall this multitude manage its common interests

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(*m*) As to the liability of corporations, see Salmond's Law of Torts, 7th ed., § 17; *Cornford* v. *Carlton Bank*, (1899) 1 Q. B. 392; *Citizens' Life Assurance Co.* v. *Brown*, (1904) A. C. 423; *Green* v. *London General Omnibus Coy.*, 7 C. B. (N. S.) 290; *Abrath* v. *North Eastern Railway Coy.*, 11 A. C. 247, per Baron Bramwell; Dernburg, Pandekten, I. sect. 66; Windscheid, I. sect. 59; Savigny, System, sects. 94, 95; D. 4. 3. 15. 1.

and affairs? How shall it dispose of property or enter into contracts? What if some be infants, or insane, or absent? What shall be the effect of the bankruptcy or death of an individual member? How shall one of them sell or otherwise alienate his share? How shall the joint and separate debts and liabilities of the partners be satisfied out of their property? How shall legal proceedings be taken by or against so great a number? These questions and such as these are full of difficulty even in the case of a private partnership, if the members are sufficiently numerous. The difficulty is still greater in the case of interests, rights, or property vested not in individuals or in definite associations of individuals, but in the public at large or in indeterminate classes of the public.

In view of these difficulties the aim of the law has been to reduce, so far as may be, the complex form of collective ownership and action to the simple and typical form of individual ownership and action. The law seeks some instrument for the effective expression and recognition of the elements of unity and permanence involved in the shifting multitude with whose common interests and activities it has to deal. There are two chief devices for this purpose, namely trusteeship and incorporation. The objects of trusteeship are various, and many of its applications have a source and significance that are merely historical. In general, however, it is used as a mode of overcoming the difficulties created by the incapacity, uncertainty, or multiplicity of the persons to whom property belongs. The property is deemed by the law to be vested, not in its virtual owners, but in one or more determinate individuals of full capacity, who hold it for safe custody on behalf of those uncertain, incapable, or multitudinous persons to whom it still in effect belongs. In this manner the law is enabled to assimilate what remains tantamount to collective ownership to the simpler form of individual ownership. If the property and rights of a charitable institution or an unincorporated trading association of many members are held in trust by one or two individuals. the difficulties of the problem are greatly reduced.

It is possible, however, for the law to take one step further in the same direction. This step it has taken, and has so attained to the conception of incorporation. This may be regarded from one point of view as merely a development of the conception of trusteeship. For it is plain that so long as a trustee is not required to *act*, but has merely to serve as a depositary of the rights of beneficiaries, there is no necessity that he should be a real person at all. He may be a mere fiction of the law. And as between the real and the fictitious trustee there are, in large classes of cases, important advantages on the side of the latter. He is *one* person, and so renders possible a complete reduction of common to individual ownership; whereas the objections to a single trustee in the case of natural persons are serious and obvious. The fictitious trustee, moreover, though not incapable of dissolution, is yet exempt from the inevitable mortality that afflicts mankind. He embodies and expresses, therefore, to a degree impossible in the case of natural trustees, the two elements of unity and of permanence which call for recognition in the case of collective interests. An incorporated company is a permanent unity, standing over against the multitudinous and variable body of shareholders whose rights and property it holds in trust.

It is true, indeed, that a fictitious trustee is incapable of acting in the matter of his trust in his proper person. This difficulty, however, is easily avoided by means of agency, and the agents may be several in number, so as to secure that safety which lies in a multitude of counsellors, while the unity of the trusteeship itself remains unaffected (*n*).

We have considered the general use and purpose of incorporation. Among its various special purposes there is one which has assumed very great importance in modern times, and which is not without theoretical interest. Incorporation

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(*n*) The purposes of the corporation sole are analogous to those of the corporation aggregate. A corporation sole consists of the successive holders of an office, fictitiously regarded by the law as a single person. The object of this device is to avoid the difficulties which are involved in the transmission from each officer to his successor of the property, liabilities, and contracts held, incurred or made by him in his official capacity. Such property, liabilities, and contracts are imputed by the law to the permanent corporation which never dies or retires from office, instead of the individual holders of the office for the time being.

is used to enable traders to trade with limited liability. As the law stands, he who ventures to trade *in propria persona* must put his whole fortune into the business. He must stake all that he has upon the success of his undertaking, and must answer for all losses to the last farthing of his possessions. The risk is a serious one even for him whose business is all his own, but it is far more serious for those who enter into partnership with others. In such a case a man may be called upon to answer with his whole fortune for the acts or defaults of those with whom he is disastrously associated.

It is not surprising, therefore, that modern commerce has seized eagerly upon a plan for eliminating this risk of ruin. Incorporation has proved admirably adapted to this end. They who wish to trade with safety need no longer be so rash as to act *in propria persona*, for they may act merely as the irresponsible agents of a fictitious being, created by them for this purpose with the aid and sanction of the Companies Act. If the business is successful, the gains made by the company will be held on behalf of the shareholders; if unsuccessful, the losses must be borne by the company itself. For the debts of a corporation are not the debts of its members. *Si quid universitati debetur, singulis non debetur, nec quod debet universitas singuli debent.* (*o*). The only risk run by its members is that of the loss of the capital with which they have supplied or undertaken to supply the company for the purpose of enabling it to carry on its business. To the capital so paid or promised, the creditors of the insolvent corporation have the first claim, but the liability of the shareholders extends no further.

The advantages which traders derive from such a scheme of limited liability are obvious. Nor does it involve any necessary injustice to creditors, for those who deal with companies know, or have the means of knowing, the nature of their security. The terms of the bargain are fully disclosed and freely consented to. There is no reason in the nature of things why a man should answer for his contracts with all his estate, rather

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(*o*) D. 3. 4. 7. 1.

than with a definite portion of it only, for this is wholly a matter of agreement between the parties.

§ 118. The Creation and Extinction of Corporations.

The birth and death of legal persons are determined not by nature, but by the law. They come into existence at the will of the law, and they endure during its good pleasure. Corporations may be established by royal charter, by statute, by immemorial custom, and in recent years by agreement of their members expressed in statutory forms and subject to statutory provisions and limitations. They are in their own nature capable of indefinite duration, this being indeed one of their chief virtues as compared with humanity, but they are not incapable of destruction. The extinction of a body corporate is called its dissolution—the severing of that legal bond by which its members are knit together into a fictitious unity. We have already noticed that a legal person does not of necessity lose its life with the destruction or disappearance of its *corpus* or bodily substance. There is no reason why a corporation should not continue to live, although the last of its members is dead; and a corporation sole is merely dormant, not extinct, during the interval between two successive occupants of the office. The essence of a body corporate consists in the *animus* of fictitious and legal personality, not in the *corpus* of its members (*p*).

§ 119. The State as a Corporation.

Of all forms of human society the greatest is the state. It owns immense wealth and performs functions which in number and importance are beyond those of all other associations. Is it, then, recognised by the law as a person? Is the commonwealth a body politic and corporate, endowed with legal personality, and having as its members all those who owe

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(*p*) It is a somewhat curious circumstance that the legal persons created by one system of law receive full recognition from other systems. This form of legal fiction has acquired extra-territorial and international validity. A French corporation can sue and be sued in an English court of justice as if it were a real person. *The Dutch West India Co.* v. *Van Moses*, 1 Str. 611; *Newby* v. *Van Oppen*, L. R. 7 Q. B. 293.

allegiance to it and are entitled to its protection? This is the conclusion to which a developed system of law might be expected to attain. But the law of England has chosen another way. The community of the realm is an organised society, but it is no person or body corporate. It owns no property, is capable of no acts, and has no rights nor any liabilities imputed to it by the law. Whatever is said to the contrary is figure of speech, and not the literal language of our law.

How, then, are we to account for this failure of the law to make so obvious and useful an application of the conception of incorporation and legal personality? Why has it failed to recognise and express in this way the unity and permanence of the state? The explanation is to be found in the existence of monarchical government. The real personality of the King, who is the head of the state, has rendered superfluous any attribution of fictitious personality to the state itself. Public property is in the eye of the law the property of the King. Public liabilities are those of the King; it is he, and he alone, who owes the principal and interest of the national debt. Whatsoever is done by the state is in law done by the King. The public justice administered in the law courts is royal justice administered by the King through his servants, the judges. The laws are the King's laws, which he enacts with the advice and consent of his Parliament. The executive government of the state is the King's government, which he carries on by the hands of his ministers. The state has no army save the King's army, no navy save the King's navy, no revenues save the royal revenues, no territory save the dominions of the King. Treason and other offences against the state and the public interest are in law offences against the King, and the public peace is the King's peace. The citizens of the state are not fellow-members of one body politic and corporate, but fellow-subjects of one sovereign lord.

Insomuch, therefore, as everything which is *public* in fact is conceived as *royal* by the law, there is no need or place for any incorporate commonwealth, *respublica*, or *universitas regni*. The King holds in his own hands all the rights, powers and activities of the state. By his agency the state acts, and through his trusteeship it possesses property and exercises rights. For the legal personality of the state itself there is no call or occasion.

The King himself, however, is in law no mere mortal man. He has a double capacity, being not only a natural person, but a body politic, that is to say, a corporation sole. The visible wearer of the crown is merely the living representative and agent for the time being of this invisible and underlying *persona ficta*, in whom by our law the powers and prerogatives of the government of this realm are vested. When the King in his natural person dies, the property real and personal which he owns in right of his crown and as trustee for the state, and the debts and liabilities which in such right and capacity have been incurred by him, pass to his successors in office, and not to his heirs, executors, or administrators. For those rights and liabilities pertain to the King who is a corporation sole, and not to the King who is a mortal man (*q*).

In modern times it has become usual to speak of the Crown rather than of the King, when we refer to the King in his public capacity as a body politic. We speak of the property of the Crown, when we mean the property which the King holds in right of his crown. So we speak of the debts due by the Crown, of legal proceedings by and against the Crown, and so on. The usage is one of great convenience, because it avoids a difficulty which is inherent in all speech and thought concerning corporations sole, the difficulty, namely, of distinguishing adequately between the body politic and the human being by whom it is represented and whose name it bears. Nevertheless, we must bear in mind that this reference to the Crown is a mere figure of speech, and not the recognition by the law of any new kind of legal or fictitious person. The Crown is not itself a person in the law. The only legal person is the body corporate constituted by the series of persons by whom the crown is worn. There is no reason of necessity or

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(*q*) *Calvin's Case*, 2 State Trials, at p. 624 : " The King hath two capacities in him : one a natural body, being descended of the blood royal of the realm ; and this body is of the creation of Almighty God, and is subject to death, infirmity, and such like : the other is a politick body or capacity, so called because it is framed by the policy of man ; and in this capacity the King is esteemed to be immortal, invisible, not subject to death, infirmity, infancy." As to the history of this idea see Holdsworth's History of English Law, III. pp. 464—469, 3rd ed.

even of convenience, indeed, why this should be so. It is simply the outcome of the resolute refusal of English law to recognise any legal persons other than corporations aggregate and sole. Roman law, it would seem, found no difficulty in treating the treasure-chest of the Emperor (*fiscus*) as *persona ficta*, and a similar exercise of the legal imagination would not seem difficult in respect of the Crown of England.

Just as our law refuses to personify and incorporate the empire as a whole, so it refuses to personify and incorporate the various constituent self-governing states of which the empire is made up. There is no such person known to the law of England as the state or government of India or of Canada (*r*). The King or the Crown represents not merely the empire as a whole, but each of its parts; and the result hitherto has been a failure of the law to give adequate recognition and expression to the distinct existence of these parts (*s*). The property and liabilities of the government of India are in law those of the British Crown. The national debts of the colonies are owing by no person known to the law save the King of England. A contract between the governments of two colonies is in law a nullity, except in so far as the King comes to be conceived of as able to make contracts with himself. All this would be otherwise, did the law recognise that the dependencies of the British Empire were bodies politic and corporate, each possessing a distinct personality of its own, and capable in its own name and person of rights, liabilities, and activities. Some of the older colonies were actually in this position, being created corporations aggregate by the royal charters to which they owed their origin: for example, Massachusetts, Rhode Island, and Connecticut. Even an unincorporated colony of the ordinary type may become incorporate, and so possessed of separate personality, by virtue of its own legislation (*t*). In

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(*r*) *Sloman* v. *Government of New Zealand*, 1 C. P. D. 563. This was an action brought in England against the "Governor and Government of the Colony of New Zealand". It failed because there was no such person or body corporate known to the law.

(*s*) See *Williams* v. *Howarth*, (1905) A. C. 551.

(*t*) The Commonwealth of Australia, for example, and also the constituent Australian states are now to be deemed for certain purposes bodies politic and corporate. For by virtue of Australian legislation they can now sue and be sued in their own names, and possess other attributes of personality;

the absence of any such separate incorporation of the different portions of the empire, their separate existence can be recognised in law only by way of that doctrine of plural personality which we have already considered in another connection (*u*). Although the King represents the whole empire, it is possible for the law to recognise a different personality in him in respect of each of its component parts. The King who owns the public lands in New Zealand is not necessarily in the eye of the law the same person who owns the public lands in England. The King, when he borrows money in his capacity as the executive government of Australia, may be deemed in law a different person from the King who owes the English national debt. How far this plural personality of the Crown is actually recognised by the common law of England is a difficult question which it is not necessary for us here to answer (*x*). It is sufficient to point out that, in the absence of any separate incorporation, this is the only effective way of recognising in law the separate rights, liabilities and activities of the different dependencies of the Crown (*y*).

SUMMARY.

The nature of personality.

Persons { Natural.
          Legal.

Natural persons—living human beings.
    The legal status of beasts.
    The legal status of dead men.
    The legal status of unborn persons.
    Double personality.

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thus an action will now lie at the suit of the State of Victoria against the State of New South Wales. The corporate character thus bestowed upon these states, however, is concurrent with, and not exclusive of the old common law principle which identifies the state with the King. Public lands in Australia, for example, are still the lands of the Crown, except so far as they may be expressly vested in the corporate state by statute.

(*u*) *Supra*, § 112.

(*x*) It has been expressly recognised by the High Court of Australia, so far as regards the Commonwealth of Australia and the constituent states: *Municipal Council of Sydney* v. *The Commonwealth*, 1 Commonwealth L. R. at p. 231, per Griffith, C.J.: "It is manifest from the whole scope of the Constitution that just as the Commonwealth and State are regarded as distinct and separate sovereign bodies, . . . so the Crown as representing those several bodies is to be regarded not as one, but as several juristic persons."

(*y*) Cf. Morgan, Introduction to G. E. Robinson's Public Authorities and Legal Liability, pp. liv *et seq.*, and pp. lxxvi *et seq.*

Legal persons.
  Legal personality based on personification.
  Personification without legal personality.

Classes of Legal persons
  1. Corporations.
  2. Institutions.
  3. Funds or Estates.

Corporations—the only legal persons known to English law.
  Corporations aggregate and corporations sole.
  The fiction involved in incorporation.
  The beneficiaries of a corporation.
  The representatives of a corporation.
  The members of a corporation.
    Authority of a corporation's agents.
    Liability of a corporation for wrongful acts.

The purposes of incorporation:
  1. Reduction of collective to individual ownership and action.
  2. Limited liability.

The creation and dissolution of corporations.

The personality of the state.

CHAPTER XVI.

TITLES.

§ 120. Vestitive Facts.

We have seen in a former chapter that every right involves a title or source from which it is derived. The title is the *de facto* antecedent, of which the right is the *de jure* consequent. If the law confers a right upon one man which it does not confer upon another, the reason is that certain facts are true of him which are not true of the other, and these facts are the title of the right. Whether a right is inborn or acquired, a title is equally requisite. The title to a debt consists in a contract, or a judgment, or other such transaction; but the title to life, liberty, or reputation consists in nothing more than in being born with the nature of a human being. Some rights the law gives to a man on his first appearance in the world; the others he must acquire for himself, for the most part not without labour and difficulty. But neither in the one case nor in the other can there be any right without a basis of fact in which it has its root and from which it proceeds.

Titles are of two kinds, being either *original* or *derivative*. The former are those which create a right *de novo*; the latter are those which transfer an already existing right to a new owner. The catching of fish is an original title of the right of ownership, whereas the purchase of them is a derivative title. The right acquired by the fisherman is newly created; it did not formerly exist in any one. But that which is acquired by the purchaser is in legal theory identical with that which is lost by the vendor. It is an old right transferred, not a new one created. Yet in each case the fact which vests the right is equally a title, in the sense already explained. For the essence of a title is not that it determines the creation of rights *de* *novo*, but that it determines the acquisition of rights new or old.

As the facts confer rights, so they take them away. All rights are perishable and transient. Some are of feeble vitality, and easily killed by any adverse influence, the bond between them and their owners being fragile and easily severed. Others are vigorous and hardy, capable of enduring and surviving much. But there is not one of them that is exempt from possible extinction and loss. The first and greatest of all is that which a man has in his own life; yet even this the law will deny to him who has himself denied it to others.

The facts which thus cause the loss of rights may be called, after Bentham, *divestitive facts*. This term, indeed, has never been received into the accepted nomenclature of the law, but there seems no better substitute available. The facts which confer rights received from Bentham the corresponding name of *investitive facts*. The term already used by us, namely, title, is commonly more convenient, however, and has the merit of being well established in the law (*y*). As a generic term to include both investitive and divestitive facts the expression *vestitive fact* may be permissible (*z*). Such a fact is one which determines, positively or negatively, the *vesting* of a right in its owner.

We have seen that titles are of two kinds, being either original or derivative. In like manner divestitive facts are either *extinctive* or *alienative*. The former are those which divest a right by destroying it. The latter divest a right by transferring it to some other owner. The receipt of payment is divestitive of the right of the creditor; so, also, is the act of the creditor in selling the debt to a third person; but in the former case the divestitive fact is extinctive, while in the latter it is alienative.

(*y*) Title meant originally a mark, sign, or inscription; *e.g.*, the title of a book; *titulus sepulchri*, an epitaph. "Pilate wrote a title and put it on the cross": John xix. 19. Thence more specifically it came to mean signs or evidence of right or ownership; *e.g.*, *titulus*, a boundary-stone; *titulus*, a title-deed (Ducange). Thence the *ground* of right or ownership, viz., an investitive fact.

(*z*) Bentham calls such facts *dispositive*.

It is plain that derivative titles and alienative facts are not two different classes of fact, but are merely the same facts looked at from two different points of view (*a*). The transfer of a right is an event which has a double aspect. It is the acquisition of a right by the transferee, and the loss of it by the transferor. The vestitive fact, if considered with reference to the transferee, is a derivative title, while from the point of view of the transferor it is an alienative fact. Purchase is a derivative title, but sale is an alienative fact; yet they are merely two different sides of the same event.

These distinctions and divisions are exhibited in the following Table:

Vestitive Facts.	Investitive Facts or Titles.	Original Titles.	Creation of Rights.
		Derivative Titles.	Transfer of Rights.
	Divestitive Facts.	Alienative Facts.	
		Extinctive Facts.	Destruction of Rights.

These different classes of vestitive facts correspond to the three chief events in the life history of a right, namely, its creation, its extinction, and its transfer. By an original title a right comes first into existence, being created *ex nihilo*; by an extinctive fact it is wholly destroyed; by derivative titles and alienative facts, on the other hand—these being, as we have seen, the same facts viewed from different sides—the existence of the right is in no way affected. The transfer of a right does not in legal theory affect its personal identity; it is the same right as before, though it has now a different owner (*b*).

§ 121. Acts in the Law.

Vestitive facts—whether they create, transfer, or extinguish rights—are divisible into two fundamentally distinct classes,

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(*a*) We may term them, with Bentham, *translative* facts.

(*b*) We here use the term transfer in its generic sense, as including both voluntary and involuntary changes of ownership. It has also a specific sense in which it includes only the former. Succession *ab intestato*, for example, is a transfer of rights in the wide sense, but not in the narrow.

according as they operate in pursuance of the will of the persons concerned, or independently of it. That is to say, the creation, transfer, and extinction of rights are either voluntary or involuntary. In innumerable cases the law allows a man to acquire or lose his rights by a manifestation or declaration of his will and intent directed to that end. In other cases it confers rights upon him, or takes them away without regard to any purpose or consent of his at all. If he dies intestate, the law itself will dispose of his estate as it thinks fit; but if he leaves a duly executed will, in which he expresses his desires in the matter, the law will act accordingly. So if he sells his property, it passes from him in accordance with his declared intent, which the law adopts as its own; but if his goods are taken in execution by a creditor, or vested in a trustee on his bankruptcy, the transfer is an involuntary one, effected in pursuance of the law's purposes, and not of his at all.

The distinction between these two classes of vestitive facts may be variously expressed. We may make use, for example, of the contrasted expressions *act of the party* and *act of the law*. An act of the party is any expression of the will or intention of the person concerned, directed to the creation, transfer, or extinction of a right, and effective in law for that purpose; such as a contract or a deed of conveyance. An act of the law, on the other hand, is the creation, extinction, or transfer of a right by the operation of the law itself, independent of any consent thereto on the part of him concerned. The expression *act of the party* is one of some awkwardness, however, and it is more convenient in general to substitute for it the technical term *act in the law*, as contrasted with those acts *of* the law which we have already defined (*c*).

Acts in the law are of two kinds, which may be distinguished as *unilateral* and *bilateral*. A unilateral act is one in which there is only one party whose will is operative; as in the case of testamentary disposition, the exercise of a power of appointment, the revocation of a settlement, the avoidance

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(*c*) This nomenclature has been suggested and adopted by Sir Frederick Pollock (Jurisprudence, p. 142, 2nd ed.). Other writers prefer to indicate acts in the law by the term juristic acts. The Germans call them Rechtsgeschäfte, or, with a different shade of meaning, Rechtshandlungen.

of a voidable contract, or the forfeiture of a lease for breach of covenant. A bilateral act, on the other hand, is one which involves the consenting wills of two or more distinct parties; as, for example, a contract, a conveyance, a mortgage, or a lease. Bilateral acts in the law are called *agreements* in the wide and generic sense of that term. There is, indeed, a narrow and specific use, in which agreement is synonymous with contract, that is to say, the creation of rights *in personam* by way of consent. The poverty of our legal nomenclature is such, however, that we cannot afford thus to use these two terms as synonymous. We shall therefore habitually use agreement in the wide sense, to include all bilateral acts in the law, whether they are directed to the creation, or to the transfer, or to the extinction of rights. In this sense conveyances, mortgages, leases, or releases are agreements no less than contracts are (*d*).

Unilateral acts in the law are divisible into two kinds in respect of their relation to the other party concerned. For

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(*d*) The use of the terms agreement and contract is curiously unsettled.

a. Agreement and contract are often used as synonyms, to mean a bilateral act in the law directed to the creation of an obligation, that is to say a right *in personam*. The objection to this usage is that we cannot afford so to waste one of these terms.

b. Contract is sometimes used to mean an agreement (in the preceding sense) enforceable by law. Pollock, Principles of Contract, p. 8, 8th ed. Indian Contract Acts, s. 2 (h). This, also, seems the sacrifice of a useful term to an inadequate purpose. Moreover the distinction does not conform to established usage. We habitually and conveniently speak of void, invalid, or illegal *contracts*.

c. Contract is sometimes used in the wide sense of any bilateral act in the law. This, however, is very unusual, and it is certainly better to use agreement in this sense. Contract, being derived from *contrahere*, involves the idea of binding two persons together by the *vinculum juris* of an obligation. An assignment is not a contract, and a release is the very reverse of a contract.

d. There remains the usage suggested and adopted in the text. An agreement is a bilateral act in the law. Est pactio duorum pluriumve in idem placitum et consensus. D. 2. 14. 1. 2. A contract, on the other hand, is that particular kind of agreement which is intended to create a right *in personam* between the parties. This is the distinction adopted by Sir W. Anson in his work on Contracts, p. 2: "Contract is that form of agreement which directly contemplates and creates an obligation." So Pothier, Traité des Obligations, sect. 3; L'espèce de convention qui a pour objet de former quelque engagement est celle qu'on appelle contrat. *Cf.* French Civil Code, Art. 1101. The Germans use *Vertrag* as equivalent to agreement in this sense; while a contract is *obligatorischer Vertrag*, or *Vertrag* in a narrower sense. Savigny, System, sect. 141. Puchta, sect. 271. Dernburg, Pandekten, I. sect. 92.

in some instances they are adverse to him; that is to say, they take effect not only without his *consent*, but notwithstanding his *dissent*. His will is wholly inoperative and powerless in the matter. This is so, for example, in the case of a re-entry by a landlord upon a tenant for breach of covenant; or the exercise of a power of appointment, as against the persons entitled in default of appointment; or the avoidance of a voidable contract; or the exercise by a mortgagee of his power of sale. In other cases it is not so; the operation of the unilateral act is subject to the dissent of the other party affected by it, though it does not require his consent. In the meantime, pending the expression of his will, the act has merely a provisional and contingent operation. A will, for example, involves nothing save the unilateral intent and assent of the testator. The beneficiaries need know nothing of it; they need not yet be in existence. But if they subsequently dissent, and reject the rights so transferred to them, the testament will fail of its effect. If, on the other hand, they accept the provisions made on their behalf, the operation of the will forthwith ceases to be provisional and becomes absolute. Similarly, a settlement of property upon trust need not be known or consented to *ab initio* by the beneficiaries. It may be a purely unilateral act, subject, however, to repudiation and avoidance by the persons intended to be benefited by it. So I may effectually grant a mortgage or other security to a creditor who knows nothing of it (*e*).

Where there are more than two parties concerned in any act in the law, it may be bilateral in respect of some of them and unilateral in respect of others. Thus a conveyance of property by A to B in trust for C may be bilateral as to A and B *inter se*—operating by the mutual consent of these two —while it may at the same time be unilateral as between A and B on the one side and C on the other—C having no knowledge of the transaction. So the exercise of a mortgagee's power of sale is bilateral as between mortgagee and purchaser, but unilateral so far as regards the mortgagor (*f*).

(*e*) *Middleton* v. *Pollock*, 2 Ch. D. 104; *Sharp* v. *Jackson*, (1899), A. C. 419.

(*f*) The terms unilateral and bilateral possess another signification

§ 122. Agreements.

Of all vestitive facts, acts in the law are the most important; and among acts in the law, agreements are entitled to the chief place. Unilateral acts are comparatively infrequent and unimportant. The residue of this chapter will therefore be devoted to the consideration of the grounds, modes, and conditions of the operation of agreement as an instrument of the creation, transfer, and extinction of legal rights. A considerable portion of what is to be said in this connection will, however, be applicable *mutatis mutandis* to unilateral acts also.

The importance of agreement as a vestitive fact lies in the universality of its operation. There are few rights which cannot be acquired through the assent of the persons upon whom the correlative duties are to be imposed. There are few rights which cannot be transferred to another by the will of him in whom they are presently vested. There are few which are not extinguished when their owner no longer desires to retain them. Of that great multitude of rights and duties of which the adult member of a civilised community stands possessed, the great majority have their origin in agreements made by him with other men. By agreements of contrary intent he may strip himself almost as destitute of rights and duties, as when in the scantiest of juridical vesture he made his first appearance before the law. *Invito beneficium non datur* (*g*), said the Romans.

By what reasons, then, is the law induced to allow this far-reaching operation to the fact of agreement? Why should the mere consent of the parties be permitted in this manner to stand for a title of legal right. Are not rights the subject-matter of justice, and is justice a mere matter of convention varying with the wills of men?

The reasons are two in number. Agreement is, in the first place, evidential of justice, and, in the second place, constitutive

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distinct from that which is attributed to them in the text. In the sense there adopted all agreements are bilateral, but there is another sense in which some of them are bilateral and others unilateral. An agreement is bilateral, in this latter signification, if there is something *to be done* by each party to it, while it is unilateral if one party is purely passive and free from legal obligation, all the activity and obligation being on the other side. An agreement to lend money is bilateral, while an agreement to give money is unilateral.

(*g*) D. 50. 17. 69.

of it. There is in general no better evidence of the justice of an arrangement than the fact that all persons whose interests are affected by it have freely and with full knowledge consented to it. Men are commonly good judges of their own interests, and in the words of Hobbes "there is not ordinarily a greater sign of the equal distribution of anything, than that every man is contented with his share." When, therefore, all interests are satisfied, and every man is content, the law may safely presume that justice has been done, and that each has received his own. The determination of the law is needed only in default of the agreement of the parties. Hence it is, that he who agrees with another in any declaration of what are to be their respective rights and duties will not be suffered to go back from his word, and will not be heard to dispute the justice of the result. The exceptions to this rule are themselves defined by equally rigid rules; and he who would disclaim a duty which he has thus imposed upon himself, or reclaim a right which he has thus transferred or abandoned, must bring himself within one of those predetermined exceptions. Otherwise he will be held bound by his own words.

This conclusive presumption of the justice of consensual declarations of right is, however, only one of the moral foundations of the law of agreement. Consent, whether or not affording evidence that an arrangement is intrinsically just, does at any rate go far to render just the subsequent enforcement of that arrangement. It is one of the leading principles of justice to guarantee to men the fulfilment of their reasonable expectations. In all matters that are otherwise indifferent, expectation is of predominant influence in the determination of the rule of right, and of all the grounds of rational expectation there is none of such general importance as mutual consent. "The human will," says Aquinas, "is able by way of consent to make a thing just; provided that the thing is not in itself repugnant to natural justice" (*h*).

There is an obvious analogy between agreement and legislation—the former being the private and the latter the public declaration and establishment of rights and duties. By way of legislation the state does for its subjects that which in

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(*h*) Summa, 2. 2. q. 57. art. 2.

other cases it allows them to do for themselves by way of agreement. As to the respective spheres of these two operations, the leading maxim is *Modus et conventio vincunt legem*. Save when the interests of the public at large demand a different rule, the autonomy of consenting parties prevails over the legislative will of the state. So far as may be, the state leaves the rule of right to be declared and constituted by the agreement of those concerned with it. So far as possible, it contents itself with executing the rules which its subjects have made for themselves. And in so doing it acts wisely. For, in the first place, the administration of justice is enabled in this manner to escape in a degree not otherwise attainable the disadvantages inherent in the recognition of rigid principles of law. Such principles we must have; but if they are established *pro re nata* by the parties themselves, they will possess a measure of adaptability to individual cases which is unattainable by the more general legislation of the state itself. Amid the infinite diversities and complexities of human affairs the state wisely despairs of truly formulating the rules of justice. So far as possible, it leaves the task to those who, by their nearness to the facts, are better qualified for it. It says to its subjects: Agree among yourselves as to what is just in your individual concerns, and I shall enforce your agreement as the rule of right.

In the second place, men are commonly better content to bear the burdens which they themselves have taken up, than those placed upon them by the will of a superior. They acquiesce easily in duties of their own imposition, and are well pleased with rights of their own creation. The law or the justice which best commends itself to them is that which they themselves have made or declared. Wherefore, instead of binding its subjects, the state does well in allowing them to bind themselves.

§ 123. The Classes of Agreements.

Agreements are divisible into three classes, for they either create rights, or transfer them, or extinguish them. Those which create rights are themselves divisible into two sub-classes, distinguishable as *contracts* and *grants*. A contract is an agreement which creates an obligation or right *in personam* between the parties to it. A grant is an agreement which creates a right of any other description; examples being grants of leases, easements, charges, patents, franchises, powers, licences, and so forth. An agreement which transfers a right may be termed generically an *assignment*. One which extinguishes a right is a *release*, *discharge*, or *surrender*.

As already indicated, a contract is an agreement intended to create a right *in personam* between the contracting parties. No agreement is a contract unless its effect is to bind the parties to each other by the *vinculum juris* of a newly created personal right. It commonly takes the form of a promise or set of promises. That is to say, a declaration of the consenting wills of two persons that one of them shall henceforth be under an obligation to the other naturally assumes the form of an undertaking by the one with the other to fulfil the obligation so created. Not every promise, however, amounts to a contract. To constitute a contract there must be not merely a promise to do a certain act, but a promise, express or implied, to do this act as a legal duty. When I accept an invitation to dine at another man's house, I make him a promise, but enter into no contract with him. The reason is that our wills, though consenting, are not directed to the creation of any legal right or to any alteration of our legal relations towards each other. The essential form of a contract is not: I promise this to you; but: I agree with you that henceforth you shall have a legal right to demand and receive this from me. Promises that are not reducible to this form are not contracts. Therefore the consent that is requisite for the creation of rights by way of contract is essentially the same as that required for their transfer or extinction. The essential element in each case is the express or tacit reference to the legal relations of the consenting parties.

Taking into account the two divisions of the consensual creation of rights, there are, therefore, four distinct kinds of agreements:—

1. Contracts—creating rights *in personam*.
2. Grants—creating rights of any other kind.

3. Assignments—transferring rights.
4. Releases—extinguishing rights.

It oftens happens that an agreement is of a mixed nature, and so falls within two or more of these classes at the same time. Thus the sale of a specific chattel is both a contract and an assignment, for it transfers the ownership of the chattel and at the same times creates an obligation to pay the price. So a lease is both a grant and a contract, for it creates real and personal rights at the same time. In all such cases the agreement must be classed in accordance with its chief or essential operation, its other effects being deemed subsidiary and incidental.

A frequent result of the difference between law and equity, and between legal and equitable rights and ownership, is that the same agreement has one effect in law and another in equity. In law it may be a mere contract, and in equity an assignment or a grant. Thus a written agreement for the sale of land is in law nothing more than a contract imposing upon the seller a personal obligation to execute a conveyance under seal, but not in itself amounting to a transfer of the ownership of the land. In equity, on the other hand, such an agreement amounts to an assignment. The equitable ownership of the land passes under it to the purchaser forthwith, and the vendor holds the legal ownership in trust for him. Similarly a contract to grant a *legal* lease or mortgage or servitude is itself the actual grant of an *equitable lease*, mortgage, or servitude. For it is a maxim of Chancery that equity regards that as already done which ought to be done.

§ 124. Void and Voidable Agreements.

In respect of their legal efficacy agreements are of three kinds, being either *valid, void*, or *voidable*. A valid agreement is one which is fully operative in accordance with the intent of the parties. A void agreement is one which entirely fails to receive legal recognition or sanction, the declared will of the parties being wholly destitute of legal efficacy. A voidable agreement stands midway between these two cases. It is not a nullity, but its operation is conditional and not absolute. By reason of some defect in its origin it is liable to be destroyed or cancelled at the option of one of the parties to it. On the exercise of this power the agreement not only ceases to have any efficacy, but is deemed to have been void *ab initio*. The avoidance of it relates back to the making of it. The hypothetical or contingent efficacy which has hitherto been attributed to it wholly disappears, as if it had never existed. In other words, a voidable agreement is one which is void or valid at the election of one of the parties to it. A lease determinable on notice or on re-entry for breach of covenant is not for that reason voidable; because, when determined, it is destroyed not *ab initio*, but merely from then onwards (*i*).

Void and voidable agreements may be classed together as *invalid*. The most important causes of invalidity are six in number, namely, (1) incapacity, (2) informality, (3) illegality, (4) error, (5) coercion, and (6) want of consideration.

1. *Incapacity*. Certain classes of persons are wholly or partially destitute of the power of determining their rights and liabilities by way of consent. They cannot, at least to the same extent as other persons, supersede or supplement the common law by subjecting themselves to conventional law of their own making. In the case of minors, lunatics, and convicts, for example, the common law is peremptory, and not to be derogated from or added to by their agreement. So the agreements of an incorporated company may be invalid because *ultra vires*, or beyond the capacity conferred upon it by law.

2. *Informality*. Agreements are of two kinds, which may be distinguished as *simple* and *formal*. A simple agreement is one in which nothing is required for its effective operation beyond the manifestation, in whatever fashion, of the consenting wills of the parties. A formal agreement, on the other hand, is one in which the law requires not merely that consent shall exist, but that it shall be manifested in some particular form, in default of which it is held of no account. Thus the intent of the parties may be held effective only if expressed in writing signed by them, or in writing authenticated by the more solemn form of sealing; or it must be embodied in some appointed form of words; or it must be acknowledged in the

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(*i*) In respect of the efficacy of contracts, there is a special case which requires a word of notice. A contract may be neither void nor voidable, but yet *unenforceable*. That is to say, no action will lie for the enforcement of it. The obligation created by it is imperfect. See *ante*, § 78. An example is a verbal contract which ought to be in writing under the Statute of Frauds.

presence of witnesses, or recorded by some form of public registration; or it must be accompanied by some formal act, such as the delivery of the subject-matter of the agreement.

The leading purpose of all such forms is twofold. They are, in the first place, designed as pre-appointed evidence of the fact of consent and of its terms, to the intent that this method of determining rights and liabilities may be provided with the safeguards of permanence, certainty, and publicity. In the second place their purpose is that all agreements may by their help be the outcome of adequate reflection. Any necessary formality has the effect of drawing a sharp line between the preliminary negotiations and the actual agreement, and so prevents the parties from drifting by inadvertence into unconsidered consent.

3. *Illegality*. In the third place an agreement may be invalid by reason of the purposes with which it is made. To a very large extent men are free to agree together upon any matter as they please; but this autonomous liberty is not absolute. Limitations are imposed upon it, partly in the interests of the parties themselves, and partly on behalf of the public. There is much of the common law which will not suffer itself to be derogated from by any private agreement; and there are many rules which, though they in no way infringe upon the common law, cannot be added to it as supplementary. That is to say, there are many matters in which the common law will admit of no abatement, and many in which it will admit of no addition, by way of conventional law. It is true in great part that *Modus et conventio vincunt legem*; but over against this principle we must set the qualification, *Privatorum conventio juri publico non derogat*. By *jus publicum* is here meant that part of the law which concerns the public interest, and which for this reason the agreements of private persons cannot be allowed to infringe upon (*k*). Agreements which in this way overpass the limits allowed by the law are said in a wide sense to be illegal, or to be void for illegality. They may or may not be illegal in a narrower sense,

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(*k*) D. 50. 17. 45. 1.

as amounting in their making or in their performance to a criminal or civil wrong.

4. *Error or mistake.* Error or mistake, as a ground of invalidity, is of two kinds, which are distinguishable as *essential* and *unessential*. Essential error is that which is of such a nature as to prevent the existence of any real consent, and therefore of any real agreement. The parties have not in reality meant the *same* thing, and therefore have not in reality agreed to *any* thing. Their agreement exists in appearance only, and not in reality. This is the case if A. makes an offer to B. which is accepted in mistake by C.; or if A. agrees to sell land to B., but A. is thinking of one piece of land, and B. is thinking of another. The effect of error of this kind is to make the agreement wholly void, inasmuch as there is in truth no agreement at all, but only the external semblance and form of one (*l*).

There is, however, an exception to this rule when the error is due to the negligence of one of the parties and is unknown to the other. For in such a case he who is in fault will be estopped by his own carelessness from raising the defence of essential error, and will be held bound by the agreement in the sense in which the other party understood it (*m*).

Unessential error, on the other hand, is that which does not relate to the nature or contents of the agreement, but only to some external circumstance, serving as one of the inducements which led to the making of it; as when A. agrees to buy B.'s horse because he believes it to be sound, whereas it is in reality unsound. This is not essential error, for there is a true *consensus ad idem*. The parties have agreed to the same thing in the same sense, though one of them would not have made the agreement had he not been under a mistake. The general rule is that unessential error has no effect on the validity of an agreement. Neither party is in any way concerned in law with the reasons which induced the other to give his consent. That which men consent to they must abide by, whether their reasons are good or bad. And this

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(*l*) *Cundy* v. *Lindsay*, 3 A. C. 459; *Raffles* v. *Wichelhaus*, 2 H. & C. 906; *Phillips* v. *Brooks, Ltd.*, (1919) 2 K. B. 243.

(*m*) *King* v. *Smith*, (1900) 2 Ch. 425

is so even though one party is well aware of the error of the other (*n*).

This rule, however, is subject to an important exception, for even unessential error will in general make an agreement voidable at the option of the mistaken party, if it has been caused by the misrepresentation of the other party. He who is merely mistaken is none the less bound by his agreement; but he who is misled has a right to rescind the agreement so procured (*o*).

5. *Coercion.* In order that consent may be justly allowed as a title of right, it must be free. It must not be the product of any form of compulsion or undue influence; otherwise the moral basis of its legal operation *pro tanto* fails. Freedom, however, is a matter of degree, and it is no easy task to define the boundary line that must be recognised by a rational system of law. We can only suggest, generally, that there should be such liberty of choice as to create a reasonable presumption that the party exercising it has chosen that which he desires, and not merely submitted to that which he cannot avoid. We cannot usefully enter here into any examination of the actual results that have been worked out in this matter by English law.

6. *Want of consideration.* A further condition very commonly required by English law for the existence of fully efficacious consent is that which is known by the technical name of *consideration*. This requirement is, however, almost wholly confined to the law of contract, other forms of agreement being generally exempt from it.

A consideration in its widest sense is the reason, motive, or inducement, by which a man is moved to bind himself by an agreement. It is not for nothing that he consents to impose an obligation upon himself, or to abandon or transfer a right. It is in *consideration* of such and such a fact that he agrees to bear new burdens or to forgo the benefits which the law

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(*n*) *Smith* v. *Hughes*, L. R. 6 Q. B. 597.

(*o*) In addition to the case of misrepresentation, unessential error affects any agreement which has been expressly or impliedly made conditional on the existence of the fact erroneously supposed to exist. A contract of sale, for example, is conditional on the present existence of the thing sold; if it is already destroyed, the contract for the purchase of it is void.

already allows him. If he sells his house, the consideration of his agreement is the receipt or promise of the purchase money. If he makes a settlement upon his wife and children, it is in consideration of the natural love and affection which he has for them. If he promises to pay a debt incurred by him before his bankruptcy, the consideration of his promise is the moral obligation which survives his legal indebtedness to his creditors. Using the term in this wide sense, it is plain that no agreement made with knowledge and freedom by a rational man can be destitute of some species of consideration. All consent must proceed from some efficient cause. What, then, is meant by saying that the law requires a consideration as a condition of the validity of an agreement? The answer is that the consideration required by the law is a consideration of a kind which the law itself regards as sufficient. It is not enough that it should be deemed sufficient by the parties, for the law has itself authoritatively declared what facts amount to a valid and sufficient consideration for consent, and what facts do not. If men are moved to agreement by considerations which the law refuses to recognise as good, so much the worse for the agreement. *Ex nudo pacto non oritur actio* To bare consent, supported by no technically suitable inducement, the law allows no operation.

What considerations, then, does the law select and approve as sufficient to support a contract? Speaking generally, we may say that none are good for this purpose save those which are *valuable*. By a valuable consideration is meant something of value given, done, or promised, by one party in exchange for the promise of the other. By English law no promise (unless under seal or of record) is binding which does not, as it were, " cost " the promisee something. Contracts which are purely unilateral, all the obligation being on one side, and nothing either given or promised on the other, are destitute of legal operation. Every valid contract (*p*) is reducible to the form of a bargain that if I do something for you, you will do something for me.

The thing thus given, done, or promised, by way of con-

(*p*) With the exception of contracts under seal and contracts of record, to which the doctrine of consideration is inapplicable.

sideration must be of some *value*. That is to say, it must be material to the interests at any rate of the promisee. It will usually involve some gain or benefit to the promisor by way of recompense for the burden of his promise, but in that it must in every instance " move from the promisee " it must in that sense involve some loss or disadvantage to the promisee for which the benefit of the promise is a recompense. Commonly it possesses both of these qualities at once, but the latter alone is apparently sufficient. Thus if I promise gratuitously to take care of property which the owner deposits with me, I am bound by that promise, although I receive no benefit in recompense for it, because there is a sufficient consideration for it in the detriment incurred by the promisee in entrusting his property to my guardianship. But if the thing given, done, or promised, by way of consideration is of no value at all, being completely indifferent to both parties, it is insufficient, and the contract is invalid; as, for example, the doing of something which one is already bound to the other party to do, or the surrender of a claim which is known to be unfounded.

At one time it was supposed to be the law that a merely moral obligation was in the same manner a sufficient basis for a promise of performance, and though this is no longer true as a general proposition, certain particular applications of the principle still survive, while others have only in modern times been abolished by statute. Thus a promise made by a discharged bankrupt to pay a creditor in full was formerly actionable, because made in consideration of the moral obligation which survives the legal indebtedness of an insolvent. For the same reason, a promise made after majority to pay debts incurred during infancy rendered those debts legally enforceable, until the law was altered in this respect by explicit legislation. Similarly, a promise to pay a debt barred by prescription is legally effective even yet, the consideration being the moral (and imperfect legal) obligation which survives the period of prescription.

With respect to the rational basis of this doctrine, it is to be noticed that the requirement of consideration is not absolute, but conditional on the absence of a certain formality, namely that of a sealed writing. Form and consideration are two alternative conditions of the validity of contracts and of certain other kinds of agreements. It may be suggested, therefore, that they may be founded on the same reasons and fulfil the same functions. They are, it would seem, intended as a precaution against the risk of giving legal efficacy to unconsidered promises and to the levities of speech. The law selects certain reasons and inducements, which are normally sufficient for reasoned and deliberate consent, and holds valid all agreements made on these grounds, even though informal. In all other cases it demands the guarantee of solemn form. There can be little doubt, however, that our law has shown itself too scrupulous in this matter; in other legal systems no such precaution is known, and its absence seems to lead to no ill results.

Although the doctrine of consideration, in the form received by English law, is unknown elsewhere, it is—from the analytical if not also from the historical point of view—simply a modification of a doctrine known to the civil law and to several modern systems, more especially to that of France. Article 1131 of the French Civil Code provides that: " L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet " (q). This *cause* or *causa* is a near synonym for consideration, and we find the terms used interchangeably in the earlier English authorities (r). There is, however, an essential difference between the English and the Continental principle. Unlike the former, the latter never rejects any cause or consideration as *insufficient*. Whatever motive or inducement is enough to satisfy the contracting parties is enough to satisfy the law, even though it is nothing more than the *causa liberalitatis* of a voluntary gift. By an obligation *sans cause*, or contract without consideration, French law does not mean a contract made without any motive or inducement (for there are none such), nor a contract made from an inadequate motive or inducement (for the law makes no such distinctions), but a contract made for a consideration which has failed—*causa non secuta*, as the Romans called it. The second ground of invalidity mentioned in the Article cited is the *falsity* of the consideration (*falsa causa*). A consideration may be based on a mistake, so that it is imaginary and not real; as when I agree to buy a horse which, unknown to me, is already dead, or a ship which has been already wrecked, or give a promissory note for a debt which is not truly owing. Finally, a *causa turpis*, or illegal consideration, is as fatal to a contract in French and Roman law as in English.

(q) Cf. D. 44. 4. 2. 3. Si quis sine causa ab aliquo fuerit stipulatus, deinde ex ea stipulatione experiatur, exceptio utique doli mali ei nocebit. See also D. 12. 7. 1. pr.

(r) Salmond, Essays in Jurisprudence and Legal History, p. 219.

In English law what is styled the failure of consideration (*causa non secuta*) and its unreality due to error (*causa falsa*) are grounds respectively of discharge and of invalidity, only when the non-occurrence of such failure or the absence of such error is expressly or impliedly made a condition of the contract. In a contract for the sale of a chattel, for example, the present existence of the chattel is an implied condition of the validity of the sale (*s*).

SUMMARY.

Vestitive Facts.	Investitive Facts or Titles.	Original Titles.	Creation of Rights.
		Derivative Titles.	Transfer of Rights.
	Divestitive Facts.	Alienative Facts.	
		Extinctive Facts.	Destruction of Rights.

Vestitive Facts.
- Acts of the law.
- Acts in the law.
  - Unilateral.
  - Bilateral, or Agreements.

Agreements
1. Contracts—creating rights *in personam*.
2. Grants—creating rights of other descriptions.
3. Assignments—transferring rights.
4 Releases—extinguishing rights.

Grounds of the operation of agreements.

Comparison of agreement and legislation.

Agreements.
- Valid.
- Invalid.
  - Void.
  - Voidable.

(*s*) The French law as to the cause or consideration of a contract will be found in Pothier, Obligations, sects. 42—46, and Baudry-Lacantinerie, Obligations, sects. 295—327. Whether the English doctrine of consideration is historically connected with the *causa* of the civil law is a matter of dispute, and there is much to be said on both sides.

The causes of invalidity.

1. Incapacity.
2. Informality.
3. Illegality.
4. Error.
5. Coercion.
6. Want of consideration.

CHAPTER XVII.

LIABILITY.

§ 125. The Nature and Kinds of Liability.

He who commits a wrong is said to be liable or responsible for it. Liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy of the wrong. This *vinculum juris* is not one of mere duty or obligation; it pertains not to the sphere of *ought* but to that of *must*. It has its source in the supreme will of the state, vindicating its supremacy by way of physical force in the last resort against the unconforming will of the individual. A man's liability consists in those things which he *must* do or suffer, because he has already failed in doing what he *ought*. It is the *ultimatum* of the law (*a*).

The purpose of this chapter and of the two which follow it is to consider the general theory of liability. We shall investigate the leading principles which determine the existence, the incidence, and the measure, of responsibility for wrongdoing. The special rules which relate exclusively to particular kinds of wrongs will be disregarded as irrelevant to the purpose of our inquiry.

Liability is in the first place either civil or criminal, and in the second place either remedial or penal. The nature of these distinctions has been already sufficiently considered in a previous chapter on the Administration of Justice. We there saw that civil liability is an exposedness to successful civil proceedings, and that a civil proceeding is one whose direct purpose is the enforcement of a right vested in the

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(*a*) We have already seen that the term liability has also a wider sense, in which it is the correlative of *any* legal power or liberty, and not merely of the right of action or prosecution vested in a person wronged. *Supra*, § 77.

plaintiff. Criminal liability, on the other hand, is an exposedness to successful criminal proceedings, and a proceeding of this nature is one whose direct purpose is the punishment of a wrong committed by the defendant (*b*).

We also saw that the law often punishes a wrong by creating and enforcing against the wrongdoer a new obligation; for example, that of paying a pecuniary penalty or damages. In such a case the direct purpose of the proceeding is the enforcement of the sanctioning right thus created, though its ulterior purpose is the punishment of the wrong in which this right has its source. Hence the necessity of the further distinction between penal and remedial liability. The former is that in which the purpose of the law, direct or ulterior, is or includes the punishment of a wrongdoer; the latter is that in which the law has no such purpose at all, its sole intent being the enforcement of the plaintiff's right, and the idea of punishment being wholly irrelevant. The liability of a borrower to repay the money borrowed by him is remedial; that of the publisher of a libel to be imprisoned, or to pay damages to the person injured by him, is penal. All criminal liability is penal; civil liability, on the other hand, is sometimes penal and sometimes remedial (*c*).

§ 126. The Theory of Remedial Liability.

The theory of remedial liability presents little difficulty. It may be laid down as a general principle, that, whenever the law creates a duty, it should enforce the specific fulfilment of it. The sole condition of the existence of remedial liability is the existence of a legal duty binding upon the defendant and unfulfilled by him. What a man ought to do by a rule of law, he ought to be made to do by the force of law. In law *ought* is normally equivalent to *must*, and obligation and remedial liability are in general co-existent. To this general principle, however, there are the following exceptions:—

1. In the first place, there are duties of imperfect obligation—duties the breach of which gives no cause of action, and

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(*b*) *Supra*, § 27.

(*c*) *Supra*, § 34.

creates no liability at all, either civil or criminal, penal or remedial. A debt barred by the statute of limitations, or due by the Crown, is a legal debt, but the payment of it cannot be compelled by any legal proceedings (*d*).

2. Secondly, there are many duties which from their nature cannot be specifically enforced after having once been broken When a libel has already been published, or an assault has already been committed, it is too late to compel the wrongdoer to perform his duty of refraining from such acts. Wrongs of this description may be termed transitory; once committed they belong to the irrevocable past. Others, however, are continuing; for example, the non-payment of a debt, the commission of a nuisance, or the detention of another's property. In such cases the duty violated is in its nature capable of specific enforcement, notwithstanding the violation of it.

3. In the third place, even when the specific enforcement of a duty is possible, it may be, or be deemed to be, more expedient to deal with it solely through the criminal law, or through the creation and enforcement of a substitutive sanctioning duty of pecuniary compensation. It is only in special cases, for example, that the law will compel the specific performance of a contract, instead of the payment of damages for the breach of it.

§ 127. The Theory of Penal Liability.

We now proceed to the main subject of our inquiry, namely, the general principles of penal liability. We have to consider the legal theory of punishment, in its application both to the criminal law and to those portions of the civil law in which the idea of punishment is relevant and operative. We have already, in a former chapter, dealt with the purposes of punishment, and we there saw that its end is fourfold, being deterrent, disabling, retributive, and reformative. The first of these purposes, however, is primary and essential, the others being merely secondary. In our present investigation, therefore we shall confine our attention to punishment as deterrent. The inquiry will fall into three divisions, relating (1) to the

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(*d*) *Supra*, § 78.

conditions, (2) to the incidence, and (3) to the measure of penal liability.

The general conditions of penal liability are indicated with sufficient accuracy in the legal maxim, *Actus non facit reum, nisi mens sit rea*—The act alone does not amount to guilt; it must be accompanied by a guilty mind. That is to say, there are two conditions to be fulfilled before penal responsibility can rightly be imposed, and we may conveniently distinguish these as the *material* and the *formal* conditions of liability. The material condition is the doing of some *act* by the person to be held liable. A man is to be accounted responsible only for what he himself does, not for what other persons do, or for events independent of human activity altogether. The formal condition, on the other hand, is the *mens rea* or guilty mind with which the act is done. It is not enough that a man has done some act which on account of its mischievous results the law prohibits; before the law can justly punish the act, an inquiry must be made into the mental attitude of the doer. For although the act may have been materially or objectively wrongful, the mind and will of the doer may have been innocent.

We shall see later that the *mens rea* or guilty mind includes two, and only two, distinct mental attitudes of the doer towards the deed. These are intention and negligence. Generally speaking, a man is penally responsible only for those wrongful acts which he does either wilfully or negligently. Then and only then is the *actus* accompanied by the *mens rea*. Then and then only do the two conditions of liability, the material and the formal, co-exist. In this case only is punishment justifiable, for it is in this case alone that it can be effective. Inevitable accident or mistake—the absence both of wrongful intention and of culpable negligence—is in general a sufficient ground of exemption from penal responsibility. *Impunitus est*, said the Romans, *qui sine culpa et dolo malo casu quodam damnum committit* (*e*).

We shall consider separately these two conditions of liability, analysing first the conception of an act, and secondly

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(*e*) Gaius, III. 211.

that of *mens rea* in its two forms of intention and negligence (*f*).

§ 128. Acts.

The term act is one of ambiguous import, being used in various senses of different degrees of generality. When it is said, however, that an act is one of the essential conditions of liability, we use the term in the widest sense of which it is capable. We mean by it any event which is subject to the control of the human will. Such a definition is, indeed, not ultimate, but it is sufficient for the purpose of the law. As to the nature of the will and of the control exercised by it, it is not for lawyers to dispute, this being a problem of psychology or physiology, not of jurisprudence.

(1) *Positive and Negative acts.* Of acts as so defined there are various species. In the first place, they are either positive or negative, either acts of commission or acts of omission. A wrongdoer either does that which he ought not to do, or leaves undone that which he ought to do. The term act is often used in a narrow sense to include merely positive acts, and is then opposed to omissions or forbearances instead of including them. This restriction, however, is inconvenient. Adopting the generic sense, we can easily distinguish the two species as positive and negative; but if we restrict the term to acts of commission, we leave ourselves without a name for the genus, and are compelled to resort to an enumeration of the species.

(2) *Internal and external acts.* In the second place, acts are either internal or external. The former are acts of the mind, while the latter are acts of the body. In each case the act may be either positive or negative, lying either in bodily activity or passivity, or in mental activity or passivity. To think is an internal act; to speak is an external act. To

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(*f*) The distinction between material and formal wrongdoing has long been familiar in moral philosophy. The material badness of an act depends on the actual nature, circumstances, and consequences of it. Its formal badness depends on the state of mind or will of the actor. The madman who kills his keeper offends materially but not formally; so also with him who in invincible ignorance breaks the rule of right. Material without formal wrongdoing is no ground of culpability.

work out an arithmetical problem in one's head is an act of the mind; to work it out on paper is an act of the body. Every external act involves an internal act which is related to it; but the converse is not true, for there are many acts of the mind which never realise themselves in acts of the body. The term act is very commonly restricted to external acts, but this is inconvenient for the reason already given in respect of the distinction between positive and negative acts.

(3) *Intentional and unintentional acts.* Acts are further distinguishable as being either intentional or unintentional. The nature of intention is a matter to which particular attention will be devoted later, and it is sufficient to say here that an act is intended or intentional when it is the outcome of a determination of the actor's will directed to that end. In other words, it is intentional when it was foreseen and desired by the doer, and this foresight and desire realised themselves in the act through the operation of the will. It is unintentional, on the other hand, when, and in so far as, it is not the result of any determination of the will towards a desired issue.

In both cases the act may be either internal or external, positive or negative. The term omission, while often used in a wide sense to include all negative acts, is also used in a narrower signification to include merely unintentional negative acts. It is then opposed to a forbearance, which is an intentional negative act. If I fail to keep an appointment through forgetfulness, my act is unintentional and negative; that is to say, an omission. But if I remember the appointment, and resolve not to keep it, my act is intentional and negative; that is to say, a forbearance.

The term act is very commonly restricted to intentional acts, but this restriction is inadmissible in law. Intention is not a necessary condition of legal liability, and therefore cannot be an essential element in those acts which produce such liability. An act is an event subject to the control of the will; but it is not essential that this control should be actually exercised; there need be no actual determination of the will, for it is enough that such control or determination is possible. If the control of the will is actually exercised, the act is intentional; if the will is dormant, the act is unintentional; but in each case, by virtue of the existence of the power of control, the event is equally an act. The movements of a man's limbs are acts; those of his heart are not. Not to move his arms is an act; not to move his ears is not. To meditate is an act; to dream is not. It is the power possessed by me of determining the issue otherwise which makes any event *my act*, and is the ground of my responsibility for it.

Every act is made up of three distinct factors or constituent parts. These are (1) its *origin* in some mental or bodily activity or passivity of the doer, (2) its *circumstances*, and (3) its *consequences*. Let us suppose that in practising with a rifle I shoot some person by accident. The material elements of my act are the following: its origin or primary stage, namely a series of muscular contractions, by which the rifle is raised and the trigger pulled; secondly, the circumstances, the chief of which are the facts that the rifle is loaded and in working order, and that the person killed is in the line of fire; thirdly, the consequences, the chief of which are the fall of the trigger, the explosion of the powder, the discharge of the bullet, its passage through the body of the man killed, and his death. A similar analysis will apply to all acts for which a man is legally responsible. Whatever act the law prohibits as being wrongful is so prohibited in respect of its origin, its circumstances and its consequences. For unless it has its origin in some mental or physical activity or passivity of the defendant, it is not his act at all; and apart from its circumstances and results it cannot be wrongful. All acts are, in respect of their origin, indifferent. No bodily motion is in itself unlawful. To crook one's finger may be a crime, if the finger is in contact with the trigger of a loaded pistol; but in itself it is not a matter which the law is in any way concerned to take notice of.

Circumstances and consequences are of two kinds, according as they are relevant or irrelevant to the question of liability. Out of the infinite array of circumstances and the endless chain of consequences the law selects some few as material. They and they alone are constituent parts of the wrongful act. All the others are irrelevant and without legal significance. They have no bearing or influence on the guilt of the doer. It is for the law, at its own good pleasure, to select and define the relevant and material facts in each particular species of wrong. In theft the hour of the day is irrelevant; in burglary it is material.

An act has no *natural* boundaries, any more than any other event or a place has. Its limits must be artificially defined for the purpose in hand for the time being. It is for the law to determine, in each particular case, what circumstances and what consequences shall be counted within the compass of the act with which it is concerned. To ask what act a man has done is like asking in what place he lives.

By some writers the term act is limited to that part of the act which we have distinguished as its origin. According to this opinion the only acts, properly so called, are movements of the body. "An act," it has been said (*g*), "is always a voluntary muscular contraction and nothing else." That is to say, the circumstances and consequences of an act are not part of it, but are wholly external to it. This limitation, however, seems no less inadmissible in law than contrary to the common usage of speech. We habitually and rightly include all material and relevant circumstances and consequences under the name of the act. The act of the murderer is the shooting or poisoning of his victim, not merely the muscular contractions by which this result is effected. To trespass on another man's land is a wrongful act; but the act includes the circumstance that the land belongs to another man, no less than the bodily movements by which the trespasser enters upon it (*h*).

It may be suggested that although an act must be taken to include some of its consequences, it does not include all of them, but only those which are direct or immediate. Any

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(*g*) Holmes, Common Law, p. 91. So Austin, p. 419: "The bodily movements which immediately follow our desires of them are the only human acts, strictly and properly so called."

(*h*) It is unfortunate that there is no recognised name for the origin or initial stage of the act, as contrasted with the totality of it. Bentham calls the former the *act* and the latter the *action*. Principles, ch. 8, sect. 2. Works, I. p. 40. But in common usage these two terms are synonymous, and to use them in this special sense would only lead to confusion.

such distinction, however, between direct and indirect, proximate and remote consequences, is nothing more than an indeterminate difference of degree, and cannot be made the basis of any logical definition. The distinction between an act and its consequences, between doing a thing and causing a thing, is a merely verbal one; it is a matter of convenience of speech, and not the product of any scientific analysis of the conceptions involved. There is no logical distinction between the act of killing a man and the act of doing something which results (however remotely) in his death (*i*). The present editor, however, would be inclined to admit that, whether logical or not, the distinction between an act and its consequences—as affecting for instance the theoretical borderline between trespass and trespass on the case—may not have been wholly without influence upon the history of liability in tort. So far as the English criminal law is concerned the author's analysis is doubtless in accordance with traditional ways of thinking.

§ 129. Two Classes of Wrongful Acts.

Every wrong is an act which is mischievous in the eye of the law—an act to which the law attributes harmful consequences. These consequences, however, are of two kinds, being either actual or merely anticipated. In other words, an act may be mischievous in two ways—either in its actual results or in its tendencies. Hence it is, that legal wrongs are of two kinds. The first consists of those in which the act is wrongful only by reason of accomplished harm which in fact ensues from it. The second consists of those in which the act is wrongful by reason of its mischievous tendencies, as recognised by the law, irrespective of the actual issue. In the first case there is no wrong or cause of action without proof of actual damage; in the second case it is sufficient to prove the act itself, even though in the event no harm has followed it.

For example, if A. breaks his contract with B., it is not necessary for B. to prove that he was thereby disappointed in

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(*i*) See Salmond on Torts, § 51, 7th ed.

his reasonable expectations, or otherwise suffered actual loss, for the law takes notice of the fact that breach of contract is an act of mischievous tendency, and therefore treats it as wrongful irrespective of the actual issue. The loss, if any, incurred by B. is relevant to the measure of damages, but not to the existence of a cause of action. So if I walk across another man's field, or publish a libel upon him, I am responsible for the act without any proof of actual harm resulting from it. For trespass and libel belong to the class of acts which are judged wrongful in respect of their tendencies, and not merely in respect of their results. In other cases, on the contrary, actual damage is essential to the cause of action. Slander, for example, is in general not actionable without proof of some loss sustained by the plaintiff, although libel is actionable *per se*. So if by negligent driving I expose others to the risk of being run over, I am not deemed guilty of any wrong until an accident actually happens. The dangerous tendency of the act is not in this case considered a sufficient ground of liability.

With respect to this distinction between wrongs which do and those which do not, require proof of actual damage, it is to be noticed that criminal wrongs commonly belong to the latter class. Criminal liability is usually sufficiently established by proof of some act which the law deems dangerous in its tendencies, even though the issue is in fact harmless. The formula of the criminal law is usually: "If you do this, you will be held liable in all events," and not: "If you do this you will be held liable if any harm ensues." An unsuccessful attempt is a ground of criminal liability, no less than a completed offence. This, however, is not invariably so, for criminal responsibility, like civil, sometimes depends on the accident of the event. If I am negligent in the use of firearms, and kill some one in consequence, I am criminally liable for manslaughter; but if by good luck my negligence results in no accomplished mischief, I am free from all responsibility.

As to civil liability, no corresponding general principle can be laid down. In some cases proof of actual damage is required, while in other cases there is no such necessity; and the matter pertains to the detailed exposition of the law, rather than to general legal theory. It is to be noted, however, that whenever this requirement exists, it imports into the administration of civil justice an element of capriciousness from which the criminal law is commonly free. In point of criminal responsibility men are judged by their acts and by the mischievous tendencies of them, but in point of civil liability they are often judged by the actual event. If I attempt to execute a wrongful purpose, I am criminally responsible whether I succeed or not; but my civil liability will often depend upon the accident of the result. Failure in a guilty endeavour amounts to innocence. Instead of saying: "Do this, and you will be held accountable for it," the civil law often says: "Do this if you wish, but remember that you do it at your peril, and if evil consequences chance to follow, you will be answerable for them."

§ 130. Damnum sine Injuria.

Although all wrongs are, in fact or in legal theory, mischievous acts, the converse is not true. All damage done is not wrongful. There are cases in which the law will suffer a man knowingly and wilfully to inflict harm upon another, and will not hold him accountable for it. Harm of this description —mischief that is not wrongful because it does not fulfil even the material conditions of responsibility—is called *damnum sine injuria*, the term *injuria* being here used in its true sense of an act contrary to law (*in- jus*), not in its modern and corrupt sense of harm.

Cases of *damnum sine injuria* fall under two heads. There are, in the first place, instances in which the harm done to the individual is nevertheless a gain to society at large. The wrongs of individuals are such only because, and only so far as, they are at the same time the wrongs of the whole community; and so far as this coincidence is imperfect, the harm done to an individual is *damnum sine injuria*. The special result of competition in trade may be ruin to many; but the general result is, or is deemed to be, a gain to society as a whole. Competitors, therefore, do each other harm but not injury. So a landowner may do many things on his own land, which are detrimental to the interests of adjoining proprietors. He may so excavate his land as to withdraw the support required by the buildings on the adjoining property; he may prevent the access of light to the windows of those buildings; he may drain away the water which supplies his neighbour's well. These things are harmful to individuals; but it is held to serve the public interest to allow a man, within wide limits, to do as he pleases with his own.

The second head of *damnum sine injuria* includes all those cases in which, although real harm is done to the community, yet, owing to its triviality, or to the difficulty of proof, or to any other reason, it is considered inexpedient to attempt its prevention by the law. The mischief is of such a nature that the legal remedy would be worse than the disease.

§ 131. The Place and Time of an Act.

Chiefly, though not exclusively, in consequence of the territorial limits of the jurisdiction of courts, it is often material to determine the place in which an act is done. In general this inquiry presents no difficulty, but there are two cases which require special consideration. The first is that in which the act is done partly in one place and partly in another. If a man standing on the English side of the Border fires at and kills a man on the Scottish side, has he committed murder in England or in Scotland? If a contract is made by correspondence between a merchant in London and another in Paris, is the contract made in England or in France? If by false representations made in Melbourne a man obtains goods in Sydney, is the offence of obtaining goods by false pretences committed in Victoria or in New South Wales? As a matter of fact and of strict logic the correct answer in all these cases is that the act is not done either in the one place or in the other. He who in England shoots a man in Scotland commits murder in Great Britain, regarded as a unity, but not in either of its parts taken in isolation. But no such answer is allowable in law; for, so long as distinct territorial areas of jurisdiction are recognised, the law must assume that it is possible to determine with respect to every act the particular area within which it is committed.

What locality, therefore, does the law attribute to acts which thus fall partly within one territorial division and partly within another? There are three possible answers. It may be said that the act is committed in both places, or solely in that in which it has its commencement, or solely in that in which it is completed. The law is free to choose such one of these three alternatives as it thinks fit in the particular case. The last of them seems to be that which is adopted for most purposes. It has been held that murder is committed in the place in which the death occurs (*k*), and not also in the place in which the act causing the death is done, but the law on these points is not free from doubt (*l*). A contract is made in the place where it is completed, that is to say, where the offer is accepted (*m*) or the last necessary signature to the document is affixed (*n*). The offence of obtaining goods by false pretences is committed in the place in which the goods are obtained (*o*) and not in the place where the false pretence is made (*p*).

A second case in which the determination of the locality of an act gives rise to difficulty is that of negative acts. In what place does a man omit to pay a debt or to perform a contract? The true answer is apparently that a negative act takes place where the corresponding positive act *ought* to have taken place. An omission to pay a debt occurs in the place where the debt is payable (*q*). If I make in England a contract to be performed in France, my failure to perform it takes place in France and not in England. The presence of a negative act is the absence of the corresponding positive act, and the positive act is absent from the place in which it ought to have been present.

The time of an act. The position of an act in time is determined by the same considerations as its position in space. An act which

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(*k*) *Reg.* v. *Coombes*, 1 Lea. Cr. C. 388.

(*l*) *Reg.* v. *Armstrong*, 13 Cox, C. C. 184; *Reg.* v. *Keyn*, 2 Ex. D. 63.

(*m*) *Cowan* v. *O'Connor*, 20 Q. B. D. 640.

(*n*) *Muller & Co.'s Margarine, Limited* v. *Inland Revenue Commissioners*, (1900) 1 Q. B. 310; (1901) A. C. 217.

(*o*) *Reg.* v. *Ellis*, (1899) 1 Q. B. 230.

(*p*) The question is fully discussed in the case of *Reg.* v. *Keyn*, 2 Ex. D. 63, in which the captain of a German steamer was tried in England for manslaughter by negligently sinking an English ship in the Channel and drowning one of the passengers. One of the minor questions in the case was that of the place in which the offence was committed. Was it on board the English ship, or on board the German steamer, or on board neither of them? Four of the judges of the Court for Crown Cases Reserved, namely, Denman, J., Bramwell, B., Coleridge, C.J., and Cockburn, C.J., agreed that if the offence had been wilful homicide it would have been committed on the English ship. Denman, J., and Coleridge, C.J., applied the same rule to negligent homicide. Cockburn, C.J., doubted as to negligent homicide. Bramwell, B., said (p. 150): "If the act was wilful, it is done where the will intends it should take effect; aliter when it is negligent." For a further discussion of the matter, see Stephen's History of Criminal Law, II. pp. 9—12, and Oppenhoff's annotated edition of the German Criminal Code (13th ed. 1896), p. 28. The German doctrine is that an act is committed in the place where it is begun. See also Terry, Principles of Anglo-American Law, pp. 598—606, and *Edmundson* v. *Render*, (1905) 2 Ch. 320.

(*q*) *Northey Stone Co.* v. *Gidney*, (1894) 1 Q. B. 99.

begins to-day and is completed to-morrow is in truth done neither to-day nor to-morrow, but in that space of time which includes both. But if necessary the law may date it from its commencement, or from its completion, or may regard it as continuing through both periods. For most purposes the date of an act is the date of its completion, just as its place is the place of its completion (*r*).

A negative act is done at the time at which the corresponding positive act ought to have been done. The date of the non-payment of a debt is the day on which it becomes payable.

§ 132. Mens Rea.

We have seen that the conditions of penal liability are sufficiently indicated by the maxim, *Actus non facit reum, nisi mens sit rea.* A man is responsible, not for his acts in themselves, but for his acts coupled with the *mens rea* or guilty mind with which he does them. Before imposing punishment, whether civilly or criminally, the law must be satisfied of two things: first, that an act has been done which by reason of its harmful tendencies or results is fit to be repressed by way of penal discipline; and secondly, that the mental attitude of the doer towards his deed was such as to render punishment effective as a deterrent for the future, and therefore just. The first is the material, the second is the formal condition of liability. The *mens rea* may assume one or other of two distinct forms, namely, wrongful intention or culpable negligence. The offender may either have done the wrongful act on purpose, or he may have done it carelessly, and in each case the mental attitude of the doer is such as to make punishment effective. If he intentionally chose the wrong, penal discipline will furnish him with a sufficient motive to choose the right instead for the future. If, on the

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(*r*) If the law dates the commission of a wrong from the completion of it, it follows that there are cases in which a man may commit a wrong after his death. If A. excavates his own land so as to cause, after an interval, the subsidence of the adjoining land of B., there is no wrong done until the subsidence happens: *Backhouse* v. *Bonomi*, 9 H. L. C. 503; *Darley Main Colliery Co.* v. *Mitchell*, 11 A. C. 127. What shall be said, then, if A. is dead in the meantime? The wrong, it seems, is not done by his successors in title: *Hall* v. *Duke of Norfolk*, (1900) 2 Ch. 493; *Greenwell* v. *Low Beechburn Colliery*, (1897) 2 Q. B. 165. The law, therefore, must hold either that there is no wrong at all, or that it is committed by a man who is dead at the date of its commission.

other hand, he committed the forbidden act without wrongful intent, but yet for want of sufficient care devoted to the avoidance of it, punishment will be an effective inducement to carefulness in the future. But if his act is neither intentional nor negligent, if he not only did not intend it, but did his best as a reasonable man to avoid it, there can be no good purpose fulfilled in ordinary cases by holding him liable for it.

Yet there are exceptional cases in which, for sufficient or insufficient reasons, the law sees fit to break through the rule as to *mens rea*. It disregards the formal condition of liability, and is satisfied with the material condition alone. It holds a man responsible for his acts, independently altogether of any wrongful intention or culpable negligence. Wrongs which are thus independent of *mens rea* may be distinguished as wrongs of *absolute liability*.

It follows that in respect of the requirement of *mens rea* wrongs are of three kinds:

(1) Intentional or Wilful Wrongs, in which the *mens rea* amounts to intention, purpose, or design.

(2) Wrongs of Negligence, in which the *mens rea* assumes the less serious form of mere carelessness, as opposed to wrongful intent.

(3) Wrongs of Absolute Liability, in which the *mens rea* is not required, neither wrongful intent nor culpable negligence being recognised as a necessary condition of responsibility.

We shall deal with these three classes of wrongs, and these three forms of liability, in the order mentioned.

SUMMARY.

Liability	Civil	Remedial.
	Criminal	Penal.

Remedial liability:
- Specific enforcement the general rule.
- Exceptions:
  1. Non-actionable wrongs.
  2. Transitory wrongs.
  3. Continuing wrongs in which sanctional enforcement is more expedient than specific.

- Penal liability
  - Its conditions.
  - Its incidence.
  - Its measure.
- Conditions of penal liability
  - Material—*Actus.*
  - Formal—*Mens rea.*
- The nature of an act:
  1. Positive and negative acts.
  2. Internal and external acts.
  3. Intentional and unintentional acts.
- The circumstances and consequences of acts.
- The relation between *injuria* and *damnum.*
  1. All wrongs are mischievous acts.
     - Wrongs
       - In which proof of damage is required.
       - In which such proof is not required.
  2. All mischievous acts are not wrongs.
     - *Damnum sine injuria.*
       - (*a*) Loss of individual a gain to society at large.
       - (*b*) Legal remedy inexpedient.
- The place and time of an act.
- The formal condition of penal liability.
  - *Mens rea*
    - Intention.
    - Negligence.
- Wrongs
  1. Of Intention.
  2. Of Negligence.
  3. Of Absolute Liability (exceptions to the requirement of *mens rea*).

CHAPTER XVIII.

INTENTION AND NEGLIGENCE.

§ 133. The Nature of Intention.

INTENTION is the purpose or design with which an act is done. It is the foreknowledge of the act, coupled with the desire of it, such foreknowledge and desire being the cause of the act, inasmuch as they fulfil themselves through the operation of the will. An act is intentional if, and in so far as, it exists in idea before it exists in fact, the idea realising itself in the fact because of the desire by which it is accompanied (*a*).

An act may be wholly unintentional, or wholly intentional, or intentional in part only. It is wholly unintentional if no part of it is the outcome of any conscious purpose or design, no part of it having existed in idea before it became realised in fact. I may omit to pay a debt, because I have completely forgotten that it exists; or I may, through careless handling, accidentally press the trigger of a pistol in my hand and so wound a bystander. An act is wholly intentional, on the other hand, when every part of it corresponds to the precedent idea of it, which was present in the actor's mind, and of which it is the outcome and realisation. The issue falls completely within the boundaries of the intent. Finally, an act may be in part intentional and in part unintentional. The idea and the fact, the will and the deed, the design and the issue, may be only partially coincident. If I throw stones, I may intend to break a window but not to do personal harm to any one; yet in the result I may do both of these things.

(*a*) Holmes, Common Law, p. 53 : "Intent will be found to resolve itself into two things; foresight that certain consequences will follow from an act, and the wish for those consequences working as a motive which induces the act."

The student will notice that the author, in this chapter, does not confine himself either on the one hand to the popular usage of terms or on the other hand to the notions of either the criminal or the civil law. An otherwise interesting and stimulating treatment suffers somewhat in consequence.

An act, and therefore a wrong, which is intended only in part, must be classed as unintended, just as a thing which is completed only in part is incomplete. If any constituent element or essential factor of the complete wrong falls outside the limits of the doer's intent, he cannot be dealt with on the footing of wilful wrongdoing. If liability in such a case exists at all, it must be either absolute or based on negligence (*b*).

A wrong is intentional only when the intention extends to all the elements of the wrong, and therefore to its circumstances no less than to its origin and its consequences. We cannot say, indeed, that the circumstances are intended or intentional; but the act is intentional with respect to the circumstances, inasmuch as they are included in that precedent idea which constitutes the intention of the act. So far, therefore, as the knowledge of the doer does not extend to any material circumstance, the wrong is, as to that circumstance, unintentional. To trespass on A's land believing it to be one's own is not a wilful wrong. The trespasser intended, indeed, to enter upon the land, but he did not intend to enter upon land belonging to A. His act was unintentional as to the circumstance that the land belonged to A. So if a woman marries again during the lifetime of her former husband, but believing him to be dead, she does not wilfully commit the crime of bigamy, for one of the material circumstances lies outside her intention. With respect to that circumstance the will and the deed are not coincident.

Intention does not necessarily involve *expectation*. I may intend a result which I well know to be extremely improbable. So an act may be intentional with respect to a particular circumstance, although the chance of the existence of that circumstance is known to be exceedingly small. True intention is the foresight of a desired issue, however improbable—not the foresight of an undesired issue, however probable. If I fire a rifle in the direction of a man a mile away, I may know perfectly

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(*b*) It is to be noticed, however, that the part which *was* intended may constitute in itself an independent intentional wrong included in the larger and unintentional wrong of which it forms a part. Intentionally to discharge firearms in a public street is a wilful wrong, if such an act is prohibited by law. But accidentally to kill a person by the intentional discharge of firearms in a public street is a wrong of negligence.

well that the chance of hitting him is not one in a thousand; I may fully expect to miss him; nevertheless I intend to hit him if I desire to do so. He who steals a letter containing a cheque, intentionally steals the cheque also if he hopes that the letter may contain one, even though he well knows that the odds against the existence of such a circumstance are very great.

Conversely, expectation does not in itself amount to intention. An operating surgeon may know very well that his patient will probably die of the operation; yet he does not intend the fatal consequence which he expects. He intends the recovery which he hopes for but does not expect.

Although nothing can be truly intended which is not desired, it must be noticed that a thing may be desired and therefore intended, not in itself or for its own sake, but merely as the means to an end. If I desire and intend a certain end, I also desire and intend the means by which it is to be obtained, though in themselves those means may be indifferent or even objects of aversion. If I kill a man in order to rob him, I desire and intend his death, even though I deeply regret, in his interests or in my own, the necessity of it.

What shall be said, however, of consequences which, though not desired, are nevertheless known to be certain, being the inevitable concomitants of the consequences which are desired, and for the sake of which the act is done? A manufacturer establishes a factory in which he employs many workmen who are daily exposed to the risk of dangerous machinery or processes. He knows for a certainty that from time to time fatal accidents will, notwithstanding all precautions, occur to the workmen so employed. Does he then intend their deaths? A military commander orders his troops into action, well knowing that many of them will lose their lives. Does he intentionally cause their deaths? These questions are to be answered in the negative. Such consequences, though foreseen as certain, are not desired, and therefore not in fact intended (c). It is not possible so to define the term " intent " as to include both consequences which, though improbable, are desired, and consequences which, though certain, are not desired. There is no generic conception which includes both of these classes of results. It is necessary, therefore, to distinguish between producing a result intentionally and producing it knowingly. Intention and knowledge commonly go together, for he who intends a result usually knows that it will follow, and he who knows the consequences of his act usually intends them. But there may be intention without knowledge, the consequence being desired but not foreknown as certain or even probable. Conversely, there may be knowledge without intention, the consequence being foreknown as the inevitable concomitant of that which is desired, but being itself an object of repugnance rather than desire, and therefore not intended. When King David ordered Uriah the Hittite to be set in the forefront of the hottest battle, he intended the death of Uriah only, yet he knew for a certainty that many others of his men would fall at the same time and place.

(c) In former editions I expressed a contrary opinion which further consideration has now led me to reject. I treated as intentional all consequences known to be necessary.

Both in this special connection and generally, however, it is to be observed that the law may, and indeed often does, impute to a wrongdoer an intention which in truth he did not possess. Consequences which are in fact the outcome of negligence merely are sometimes in law dealt with as intentional. Thus he who intentionally does grievous bodily harm to another, though with no intent to kill him, is guilty of wilful murder if death ensues (*d*). It does not seem possible to lay down any general principle as to the cases in which such a constructive intention beyond the scope of his actual intention is thus imputed by law to a wrongdoer. This is a matter pertaining to the details of the legal system. It is sometimes said, indeed, that a person is presumed in law to intend the natural or necessary results of his actions (*e*). This, however, is much too wide a statement, for, if true, it would eliminate from the law the distinction between intentional and

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(*d*) Stephen's Criminal Law, art. 244, 5th ed.

(*e*) *R.* v. *Harvey*, 2 B. & C. p. 264 : "A party must be considered in point of law to intend that which is the necessary or natural consequence of that which he does." Cf. *Freeman* v. *Pope*, 5 Ch. App. p. 540; *Ex parte Mercer*, 17 Q. B. D. p. 298.

negligent wrongdoing, merging all negligence in constructive wrongful intent. A statement much nearer the truth is that the criminal law treats as intentional all consequences due to that form of negligence which is distinguished as recklessness —all consequences, that is to say, which the actor foresees as the probable results of his wrongful act (*f*). However this may be, it is probably correct to say that in the criminal law the known consequences of an illegal act are always imputed by the law as intentional. To this extent at least, intention in law is of wider scope than intention in fact. No man who knows that certain results will flow from his illegal act will be suffered to say that he did not intend them. Thus it has been judicially said in reference to the statutory offence of wilful damage to property (*g*): " A man must be held to do a thing wilfully when he does it either intending to cause damage or knowing that the act that he commits will cause damage." The reason for the recognition by the law of such cases of constructive intention is the expediency of extending to the more serious forms of negligent wrongdoing the liability or additional liability attached to wilful wrongdoing. *Magna culpa dolus est.*

§ 134. Intention and Motive.

A wrongful act is seldom intended and desired for its own sake. The wrongdoer has in view some ulterior object which he desires to obtain by means of it. The evil which he does to another, he does and desires only for the sake of some resulting good which he will obtain for himself. He *intends* the attainment of this ulterior object no less than he intends the wrongful act itself. His intent, therefore, is twofold, and is divisible into two distinct portions, which we may distin-

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(*f*) Kenny's Criminal Law, p. 148, 7th ed. : " Purpose always involves the idea of a desire. So also in popular parlance does intention. For a man is not ordinarily said to intend any consequences of his act which he does not desire but regrets to have to run the risk of. Yet in law it is clear that the word ' intention,' like the word ' malice,' covers all consequences whatever which the doer of an act foresees as likely to result from it, whether he does the act with an actual desire of producing them, or only in recklessness as to whether they ensue or not."

(*g*) *Roper* v. *Knott*, (1898) 1 Q. B. p. 871, per Russell, L.C.J.

guish as his immediate and his ulterior intent. The former is that which relates to the wrongful act itself; the latter is that which passes beyond the wrongful act, and relates to the object or series of objects for the sake of which the act is done. The immediate intent of the thief is to appropriate another person's money, while his ulterior intent may be to buy food with it or to pay a debt. The ulterior intent is called the *motive* of the act.

The immediate intent is that part of the total intent which is coincident with the wrongful act itself; the ulterior intent or motive is that part of the total intent which lies outside the boundaries of the wrongful act. For just as the act is not necessarily confined within the limits of the intent, so the intent is not necessarily confined within the limits of the act. The wrongdoer's immediate intent, if he has one, is his purpose *to commit* the wrong; his ulterior intent, or motive, is his purpose *in committing* it. Every wrongful act may raise two distinct questions with respect to the intent of the doer. The first of these is: *How* did he do the act—intentionally or accidentally? The second is: If he did it intentionally, *why* did he do it? The first is an inquiry into his immediate intent; the second is concerned with his ulterior intent, or motive.

The ulterior intention of one wrongful act may be the commission of another. I may make a die with intent to coin bad money; I may coin bad money with intent to utter it; I may utter it with intent to defraud. Each of these acts is or may be a distinct criminal offence, and the intention of any one of them is immediate with respect to that act itself, but ulterior with respect to all that go before it in the series.

A person's ulterior intent may be complex instead of simple; he may act from two or more concurrent motives instead of from one only. He may institute a prosecution, partly from a desire to see justice done, but partly also from ill-will towards the defendant. He may pay one of his creditors preferentially on the eve of bankruptcy, partly from a desire to benefit him at the expense of the others, and partly from a desire to gain some advantage for himself. Now the law, as we shall see later, sometimes makes liability for an act depend upon the motive with which it is done. The Bankruptcy Act, for example, regards as fraudulent any payment made by a debtor immediately before his bankruptcy with intent to prefer one of his creditors to the others. In all such cases the presence of mixed or concurrent motives raises a difficulty of interpretation. The phrase "with intent to," or its equivalents, may mean any one of at least four different things:—(1) That the intent referred to must be the sole or exclusive intent; (2) that it is sufficient if it is one of several concurrent intents; (3) that it must be the chief or dominant intent, any others being subordinate or incidental; (4) that it must be a determining intent, that is to say, an intent in the absence of which the act would not have been done, the remaining purposes being insufficient motives by themselves. It is a question of construction which of those meanings is the true one in the particular case (*h*).

§ 135. Malice.

Closely connected with the law and theory of intentional wrongdoing is the legal use of the word malice. In a narrow and popular sense this term means ill-will, spite, or malevolence; but its legal signification is much wider. Malice means in law wrongful intention. It includes any intent which the law deems wrongful, and which therefore serves as a ground of liability. Any act done with such an intent is, in the language of the law, malicious, and this legal usage has etymology in its favour. The Latin *malitia* (*i*) means badness, physical or moral—wickedness in disposition or in conduct—not specifically or exclusively ill-will or malevolence; hence the malice of English law, including all forms of evil purpose, design, intent, or motive.

We have seen, however, that intent is of two kinds, being either immediate or ulterior, the ulterior intent being commonly distinguished as the motive. The term malice is applied in law to both these forms of intent, and the result is a somewhat puzzling ambiguity which requires careful notice. When we say that an act is done maliciously, we mean one of two distinct things. We mean either that it is done intentionally, or that it is done with some wrongful motive. In the phrases malicious homicide and malicious injury to property, malicious is merely equivalent to wilful or intentional. I burn down a house maliciously if I burn it on purpose, but not if I burn it

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(*h*) For a discussion of this matter, see *Ex parte Hill*, 23 Ch. D. 695, per Bowen, L.J., at p. 704; also *Ex parte Taylor*, 18 Q. B. D. 295.

(*i*) See for example D. 4. 3. 1. pr.

negligently. There is here no reference to any ulterior purpose or motive. But, on the other hand, malicious prosecution does not mean intentional prosecution; it means a prosecution inspired by some motive of which the law disapproves. A prosecution is malicious, for example, if its ulterior intent is the extortion of money from the accused. So, also, with the malice which is needed to make a man liable for defamation on a privileged occasion; I do not utter defamatory statements maliciously simply because I utter them intentionally (*j*).

Although the word *malitia* is not unknown to the Roman lawyers, the usual and technical name for wrongful intent is *dolus*, or more specifically *dolus malus*. *Dolus* and *culpa* are the two forms of *mens rea*. In a narrower sense, however, *dolus* includes merely that particular variety of wrongful intent which we term fraud—that is to say, the intent to deceive (*k*). From this limited sense it was extended to cover all forms of wilful wrongdoing. The English term fraud has never received an equally wide extension. It resembles *dolus*, however, in having a double use. In its narrow sense it means deceit, as we have just said, and is commonly opposed to force. In a wider sense it includes all forms of dishonesty, that is to say, all wrongful conduct inspired by a desire to derive profit from the injury of others. In this sense fraud is commonly opposed to malice in its popular sense. I act fraudulently when the motive of my wrongdoing is to derive some material gain for myself, whether by way of deception, force, or otherwise. But I act maliciously when my motive is the pleasure of doing harm to another, rather than the acquisition of any advantage for myself. To steal property is fraudulent; to damage or destroy it is malicious.

§ 136. Relevance and Irrelevance of Motives.

We have already seen in what way and to what extent a man's immediate intent is material in a question of penal liability. As a general rule no act is a sufficient basis of responsibility unless it is done either wilfully or negligently.

(*j*) It is to malice in one only of these two uses that the well-known definition given in *Bromage* v. *Prosser* (4 Barn. & C. 247; 28 R. R. 241) is applicable: "Malice in common acceptation means ill-will against a person; but in its legal sense it means a wrongful act done intentionally, without just cause or excuse." See, to the same effect, *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, 23 Q. B. D. at p. 612, per Bowen, L.J.; and *Allen* v. *Flood*, (1898) A. C. at p. 94, per Lord Watson.

(*k*) D. 4. 3. 1. 2.

Intention and negligence are the two alternative formal conditions of penal liability.

We have now to consider the relevance or materiality, not of the immediate, but of the ulterior intent. To what extent does the law take into account the motives of a wrongdoer? To what extent will it inquire, not merely what the defendant has done, but why he has done it? To what extent is malice, in the sense of improper motive, an element in legal wrongdoing?

In answer to this question we may say generally (subject, however, to very important qualifications) that in law a man's motives are irrelevant. As a general rule no act otherwise lawful becomes unlawful because done with a bad motive; and conversely no act otherwise unlawful is excused or justified because of the motives of the doer, however good. The law will judge a man by what he does, not by the reasons for which he does it.

"It is certainly," says Lord Herschell (*l*), "a general rule of our law that an act *prima facie* lawful is not unlawful and actionable on account of the motives which dictated it." So it has been said (*m*): "No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious." "Much more harm than good," says Lord Macnaghten (*n*), "would be done by encouraging or permitting inquiries into motives when the immediate act alleged to have caused the loss for which redress is sought is in itself innocent or neutral in character and one which anybody may do or leave undone without fear of legal consequences. Such an inquisition would I think be intolerable."

An illustration of this irrelevance of motives is the right of a landowner to do harm to adjoining proprietors in certain defined ways by acts done on his own land. He may intercept the access of light to his neighbour's windows, or withdraw by means of excavation the support which his land affords to his neighbour's house, or drain away the water which would otherwise supply his neighbour's well. His right to do all

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(*l*) *Allen* v. *Flood*, (1898) A. C. at p. 123.
(*m*) *Corporation of Bradford* v. *Pickles*, (1895) A. C. 587, at p. 598.
(*n*) *Allen* v. *Flood*, (1898) A. C. 92, at p. 152.

these things depends in no way on the motive with which he does them. The law cares nothing whether his acts are inspired by an honest desire to improve his own property, or by a malevolent impulse to damage that of others. He may do as he pleases with his own (*o*).

To this rule as to the irrelevance of motives there are, however, very important exceptions, more especially in the criminal law. The chief of these are the following.

§ 137. Criminal Attempts.

An attempt to commit an indictable offence is itself a crime. Every attempt is an act done with intent to commit the offence so attempted. The existence of this ulterior intent or motive is of the essence of the attempt. The act in itself may be perfectly innocent, but is deemed criminal by reason of the purpose with which it is done. To mix arsenic in food is in itself a perfectly lawful act, for it may be that the mixture is designed for the poisoning of rats. But if the purpose is to kill a human being, the act becomes by reason of this purpose the crime of attempted murder. In such cases a rational system of law cannot avoid considering the motive as material, for it is from the motive alone that the act derives all its mischievous tendency, and therefore its wrongful nature.

Although every attempt is an act done with intent to commit a crime, the converse is not true. Every act done with this intent is not an attempt, for it may be too remote from the completed offence to give rise to criminal liability, notwithstanding the criminal purpose of the doer. I may buy matches with intent to burn a haystack, and yet be clear of attempted arson; but if I go to the stack and there light one of the matches, my intent has developed into a criminal attempt. To intend to commit a crime is one thing; to get ready to commit it is another; to try to commit it is a third. We may say, indeed, that every intentional crime involves

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(*o*) The Roman law as to the rights of adjoining proprietors was different. Harm done *animo nocendi*, that is to say, with a malicious motive, was actionable. D. 39. 3. 1. 12. The German Civil Code, sect. 226, provides quite generally that the exercise of a right is unlawful when its only motive is to harm another person.

four distinct stages—Intention, Preparation, Attempt, and Completion. The two former are commonly innocent. An unacted intent is no more a ground of liability than is an unintended act. The will and the deed must go together. Even action in pursuance of the intent is not commonly criminal if it goes no further than the stage of preparation. I may buy a pistol with felonious purpose, and yet remain free from legal guilt. There is still a *locus poenitentiae*. But the two last stages in the offence, namely, attempt and completion, are grounds of legal liability. How, then, are we to draw the line which thus separates innocence from guilt? What is the distinction between preparing to commit a crime and attempting to commit it? How far may a man go along the path of his criminal intent, and yet turn back in safety if his heart or the occasion fails him? This is a question to which English law gives no definite or sufficient answer. "An attempt to commit a crime," says Sir James Stephen in his Digest of the Criminal Law (*p*), "is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission, if it were not interrupted. The point at which such a series of acts begins cannot be defined, but depends upon the circumstances of each particular case." This, however, affords no adequate guidance, and lays down no principle which would prevent a conviction for attempted forgery on proof of the purchase of ink and paper.

The German Criminal Code (*q*), on the other hand, defines an attempt as an act done with intent to commit a crime, and amounting to the commencement of the execution of it. That is to say, an act is not an attempt unless it forms a constituent part of the completed crime. Otherwise it is merely preparatory. It may be doubted, however, whether this is a sufficient solution of the problem. We know when a crime is completed, but at what stage in the long series of preliminary acts does it begin? Not later, it would seem, than the earliest act done with the requisite criminal intent;

(*p*) Art. 50, 5th ed.

(*q*) Strafgesetzbuch, sect. 43. *Cf.* the French Code Pénal, Art. 2.

yet this act may be far too remote to constitute an attempt.

What, then, is the true principle? The question is a difficult one, but the following answer may be suggested. An attempt is an act of such a nature that it is itself evidence of the criminal intent with which it is done. A criminal attempt bears criminal intent upon its face. *Res ipsa loquitur.* An act, on the other hand, which is in itself and on the face of it innocent, is not a criminal attempt, and cannot be made punishable by evidence *aliunde* as to the purpose with which it is done. To buy matches with intent to commit arson is not attempted arson, because the act is innocent on its face, there being many lawful reasons for the purchase of matches. But to buy dies with intent to coin money is attempted forgery, for the act speaks for itself (*r*). For the same reason, to buy or load a gun with murderous intent is not in ordinary circumstances attempted murder; but to lie in wait with the loaded weapon, or to present it, or discharge it, is an act which itself proclaims the criminal purpose with which it is done, and it is punishable accordingly. If this is the correct explanation of the matter, the ground of the distinction between preparation and attempt is evidential merely. The reason for holding a man innocent, who does an act with intent to commit a crime, is the danger involved in the admission of evidence upon which persons may be punished for acts which in themselves and in appearance are perfectly innocent. *Cogitationis poenam nemo patitur.* No man can be safely punished for his guilty purposes, save so far as they have manifested themselves in overt acts which themselves proclaim his guilt.

(*r*) *Roberts' Case*, Dearsley, C. C. 539. Per Parke, B., at p. 551 : " An attempt at committing a misdemeanour is not an indictable attempt unless it is an act directly approximating to the commission of an offence, and I think this act is a sufficient approximation. I do not see for what lawful purpose the dies of a foreign coin can be used in England, or for what purpose they could have been procured except to use them for coining." Per Wightman, J., at p. 551 : " It is an act immediately connected with the commission of the offence, and in truth the prisoner could have no other object than to commit the offence." Per Jervis, C.J., at p. 550 : " The prisoner was in possession of machinery necessarily connected with the offence, for the express purpose of committing it, and which was obtained and could be used for no other purpose."

There is yet another difficulty in the theory of attempts. What shall be said if the act done with intent to commit a crime is of such a nature that the completion of the crime by such means is impossible: as if I attempt to steal by putting my hand into an empty pocket, or to poison by administering sugar which I believe to be arsenic? It was long supposed to be the law of England that there could be no conviction for an attempt in such cases. It was considered that an attempt must be part of a series of acts and events which, in its completeness, would actually constitute the offence attempted (*s*). Recent decisions have determined the law otherwise (*t*). The possibility of a successful issue is not a necessary element in an attempt, and this conclusion seems sound in principle. The matter, however, is not free from difficulty, since it may be argued on the other side that acts which in their nature cannot result in any harm are not mischievous either in their tendency or in their results, and therefore should not be treated as crimes. Shall an attempt to procure the death of one's enemy by means of witchcraft be punished as attempted murder?

§ 138. Other Exceptions to the Irrelevance of Motives.

Criminal attempts constitute, as we have seen, the first of the exceptions to the rule that a person's ulterior intent or motive is irrelevant in law. A second exception comprises all those cases in which a particular intent forms part of the definition of a criminal offence. Burglary, for example, consists in breaking and entering a dwelling-house by night with intent to commit a felony therein. So forgery consists in making a false document with intent to defraud. In all such instances the ulterior intent is the source, in whole or in part, of the mischievous tendency of the act, and is therefore material in law.

In civil as opposed to criminal liability the ulterior intent is very seldom relevant. In almost all cases the law looks to the act alone, and makes no inquiries into the motives from which it proceeds. There are, however, certain exceptions even in the civil law, and the chief, if not all, of these fall within the principle that a harmful act may be *damnum sine injuria* if done from a proper motive and without malice, but lacks this protection wherever it proceeds from some motive

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(*s*) *Reg.* v. *Collins*, L. & C. 471.

(*t*) *Reg.* v. *Ring*, 61 L. J. M. C. 116; *Reg.* v. *Brown*, 24 Q. B. D. 357.

of which the law does not approve. It may be expedient in the public interest to allow certain specified kinds of harm to be done to individuals, so long as they are done for some good and sufficient reason; but the ground of this privilege falls away so soon as it is abused for bad ends. In such cases, therefore, malice is an essential element in the cause of action. Examples of wrongs of this class are defamation (in certain cases of privilege) and malicious prosecution. In these instances the plaintiff must prove malice, because in all of them the defendant's act is one which falls under the head of *damnum sine injuria* so long, but so long only, as it is done with good intent.

§ 139. Jus necessitatis.

We shall conclude our examination of the theory of wilful wrongdoing by considering a special case in which, although intention is present, the *mens rea* is nevertheless absent. This is the case of the *jus necessitatis*. So far as the abstract theory of responsibility is concerned, an act which is necessary is not wrongful, even though done with full and deliberate intention. It is a familiar proverb that necessity knows no law: *Necessitas non habet legem*. By necessity is here meant the presence of some motive adverse to the law, and of such exceeding strength as to overcome any fear that can be inspired by the threat of legal penalties. The *jus necessitatis* is the right of a man to do that from which he cannot be dissuaded by any terror of legal punishment. Where threats are necessarily ineffective, they should not be made, and their fulfilment is the infliction of needless and uncompensated evil.

The common illustration of this right of necessity is the case of two drowning men clinging to a plank that will not support more than one of them. It may be the moral duty of him who has no one dependent on him to sacrifice himself for the other who is a husband or a father; it may be the moral duty of the old to give way to the young. But it is idle for the law to lay down any other rule save this, that it is the right of the stronger to use his strength for his own preservation. Another familiar case of necessity is that in which shipwrecked sailors are driven to choose between death by starvation on the one side and murder and cannibalism on the other. A third case is that of crime committed under the pressure of illegal threats of death or grievous bodily harm. "If," says Hobbes (*u*), "a man by the terror of present death be compelled to do a fact against the law, he is totally excused; because no law can oblige a man to abandon his own preservation."

It is to be noticed that the test of necessity is not the powerlessness of any possible, but that of any reasonable punishment. It is enough if the lawless motives to an act will necessarily countervail the fear of any penalty which it is just and expedient that the law should threaten. If burning alive were a fit and proper punishment for petty theft, the fear of it would probably prevent a starving wretch from stealing a crust of bread; and the *jus necessitatis* would have no place. But we cannot place the rights of property at so high a level. There are cases, therefore, in which the motives to crime cannot be controlled by any reasonable punishment. In such cases an essential element of the *mens rea*, namely freedom of choice, is absent; and so far as abstract theory is concerned, there is no sufficient basis of legal liability.

As a matter of practice, however, evidential difficulties prevent any but the most limited scope being permitted to the *jus necessitatis*. In how few cases can we say with any approach to certainty that the possibility of self-control is really absent, that there is no true choice between good and evil, and that the deed is one for which the doer is rightly irresponsible. In this conflict between the requirements of theory and the difficulties of practice the law has resorted to compromise. While in some few instances necessity is admitted as a ground of excuse, it is in most cases regarded as relevant to the measure rather than to the existence of liability. It is acknowledged as a reason for the reduction of the penalty, even to a nominal amount, but not for its total remission. Homicide in the blind fury of irresistible passion is not innocent, but neither is it murder; it is reduced to the lower level of manslaughter. Shipwrecked sailors who kill and eat their comrades

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(*u*) Leviathan, ch. 27 : Eng. Works, III. 288.

to save their own lives are in law guilty of murder itself; but the clemency of the Crown will commute the capital sentence to a short term of imprisonment (*x*).

§ 140. Negligence.

We have considered the first of the three classes into which injuries are divisible, namely those which are intentional or wilful, and we have now to deal with the second, namely wrongs of negligence.

The term negligence has two uses, for it signifies sometimes a particular state of mind, and at other times conduct resulting therefrom. In the former or subjective sense, negligence is opposed to wrongful intention, these being the two forms assumed by that *mens rea* which is a condition of penal responsibility. In the latter or objective sense, it is opposed not to wrongful intention, but to intentional wrongdoing. A similar double signification is observable in other words. Cruelty, for example, means subjectively a certain disposition and objectively conduct resulting from it. The ambiguity can scarcely lead to any confusion, for the two forms of negligence are necessarily coincident. Objective negligence is merely subjective negligence realised in conduct; and subjective negligence is of no account in the law, until and unless it is manifested in act. We shall commonly use the term in the subjective sense, and shall speak objectively not of negligence, but of negligent conduct or negligent wrongdoing (*y*).

Negligence is culpable carelessness. "It is," says Willes, J. (*z*), "the absence of such care as it was the duty of the defendant to use." What then is meant by careless-

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(*x*) *Reg.* v. *Dudley*, 14 Q. B. D. 273. The law as to compulsion and necessity is discussed in Stephen's History of the Criminal Law, vol. ii. ch. 18, and in an Article on Homicide by Necessity, in L. Q. R. I. 51. See also the German Criminal Code, sect. 54, in which the *jus necessitatis* receives express recognition.

(*y*) In Roman law negligence is signified by the terms *culpa* and *negligentia*, as contrasted with *dolus* or wrongful intention. Care, or the absence of *negligentia*, is *diligentia*. The use of the word diligence in this sense is obsolete in modern English, though it is still retained as an archaism of legal diction. In ordinary usage, diligence is opposed to idleness, not to carelessness.

(*z*) *Grill* v. *General Iron Screw Colliery Coy.*, L. R. 1 C. P. at p. 612.

ness? It is clear, in the first place, that it excludes wrongful intention. These are two contrasted and mutually inconsistent mental attitudes of a person towards his acts and their consequences. No result which is due to carelessness can have been also intended. Nothing which was intended can have been due to carelessness (*a*).

It is to be observed, in the second place, that carelessness or negligence does not necessarily consist in thoughtlessness or inadvertence. This is doubtless the commonest form of it, but it is not the only form. If I do harm, not because I intended it, but because I was thoughtless and did not advert to the dangerous nature of my act, or foolishly believed that there was no danger, I am certainly guilty of negligence. But there is another form of negligence, in which there is no thoughtlessness or inadvertence whatever. If I drive furiously down a crowded street, I may be fully conscious of the serious risk to which I expose other persons. I may not intend to injure any of them, but I knowingly and intentionally expose them to the danger. Yet if a fatal accident happens, I am liable, at the most, not for wilful, but for negligent homicide. When I consciously expose another to the risk of wrongful harm, but without any wish to harm him, and harm actually ensues, it is inflicted not wilfully, since it was not desired, nor inadvertently, since it was foreseen as possible or even probable, but nevertheless negligently.

If, then, negligence or carelessness is not to be identified with thoughtlessness or inadvertence, what is its essential nature? The correct answer seems to be that a careless person is a person who does not *care*. The essence of negligence is not inadvertence but *indifference*. Indifference is exceedingly apt to produce thoughtlessness or inadvertence; but it is not the same thing, and may exist without it, as we have seen from the example already given. If I am careless, that is to say, indifferent, as to the results of my conduct, I shall very probably fail to acquire adequate foresight and consciousness of them; but I may, on the contrary, make a very accurate

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(*a*) *Kettlewell* v. *Watson*, 21 Ch. D. at p. 706: "Fraud imports design and purpose; negligence imports that you are acting carelessly and without that design."

estimate of them, and yet remain equally indifferent with respect to them, and therefore equally negligent.

Negligence, therefore, essentially consists in the *mental attitude of undue indifference with respect to one's conduct and its consequences* (*b*).

This being so, the distinction between intention and negligence becomes clear. The wilful wrongdoer desires the harmful consequences, and therefore does the act in order that they may ensue. The negligent wrongdoer is careless (if not wholly, yet unduly) whether they ensue or not, and therefore does the act notwithstanding the risk that they may ensue. The wilful wrongdoer is liable because he desires to do the harm; the negligent wrongdoer is liable because he does not sufficiently desire to avoid it. He who will excuse himself on the ground that he meant no evil is still open to the reply: Perhaps you did not, but at all events you might have avoided it, if you had sufficiently desired so to do; and you are held liable not because you desired the mischief, but because you were careless and indifferent whether it ensued or not.

Negligence, as so defined, is rightly treated as a form of *mens rea*, standing side by side with wrongful intention as a formal ground of responsibility. For these are the two mental attitudes which alone justify the discipline of penal justice. The law may rightly punish wilful wrongdoing, because, since the wrongdoer desired the outcome of his act, punishment will supply him for the future with a good reason for desiring the opposite. So, also, the law may justly punish negligent wrongdoing, for since the wrongdoer is careless as to the interests of others, punishment will cure this defect by making those interests for the future coincident with his own. In no other case than these two can punishment be effective, and therefore in no other case is it justifiable. So far as abstract theory is

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(*b*) An excellent analysis of the conception of negligence is to be found in Merkel's Lehrbuch des deutschen Strafrechts, sects. 32 and 33. See especially sect. 32 (1): "Negligent wrongdoing is that which is not intentional, but results from culpable inadvertence (Unaufmerksamkeit) or indifference (Gleichgultigkeit). The mental attitude of the wrongdoer consists not in any desire to do harm, but in the absence of a sufficient desire to avoid it. The law is not satisfied with the mere absence of any intention to inflict injury, but demands a positive direction of the will towards the avoidance of it."

concerned, every man is exempt from penal responsibility who can truly say: The harm which I have done is not the outcome of any desire of mine to do it; neither does it proceed from any carelessness or indifference as to my acts and the results of them; I did not mean it, neither could I have avoided it by care.

It follows from the foregoing analysis that negligence is of two kinds, according as it is or is not accompanied by inadvertence. Advertent negligence is commonly termed wilful negligence or recklessness. Inadvertent negligence may be distinguished as simple. In the former the harm done is foreseen as possible or probable, but it is not willed. In the latter it is neither foreseen nor willed. In each case carelessness, that is to say, indifference as to consequences, is present; but in the former case this indifference does not, while in the latter it does prevent these consequences from being foreseen. The physician who treats a patient improperly through ignorance or forgetfulness is guilty of simple or inadvertent negligence; but if he does the same in order to save himself trouble, or by way of a scientific experiment, with full recognition of the dangers so incurred, his negligence is wilful (*c*).

This distinction is of little practical importance, but demands recognition here, partly because of the false opinion that all negligence is inadvertent, and partly because of the puzzling nature of the expression wilful negligence. In view of the fundamental opposition between intention and negligence, this expression looks at first sight self-contradictory, but it is not so. He who does a dangerous act, well knowing that he is exposing others to a serious risk of injury, and thereby causes a fatal accident, is guilty of negligent, not of wilful homicide. But the negligence is wilful, though the homicide is not. He is not merely negligent, but consciously, wilfully, and intentionally negligent; for he knows at the time the true nature of the act which he is doing. It is intentional with respect to the fact that his mental attitude towards the consequences is one of culpable indifference.

(*c*) The distinction between these two forms of negligence is well explained by Merkel, Strafrecht, sect. 33 (3).

§ 141. Objection Considered.

By way of objection to the foregoing analysis it may be said: "It is not true that in all cases negligence amounts to carelessness in the sense of indifference. A drunken man is liable for negligence if he stumbles as he walks along the street, and breaks a shop window, but he may have been exceedingly anxious to walk in a straight line and to avoid any such accident. He may have been conscientiously using his best endeavours, but they will not serve to justify him on a charge of negligence. So an unskilled physician may devote to the treatment and cure of his patient an amount of anxious attention and strenuous endeavour, far in excess of that which one more skilful would consider necessary; yet if his treatment is wrong, he is guilty of negligence."

The answer to this objection is that in these and all similar cases carelessness in the sense of indifference is really present though it is remote instead of immediate. The drunken man may be anxious and careful *now* not to break other persons' windows, but if he had been sufficiently anxious and careful on the point some time ago, he would have remained sober, and the accident would not have happened. So with the unskilful physician. It is a settled principle of law that want of skill or of professional competence is deemed to amount to negligence. *Imperitia culpae adnumeratur* (*d*). He who will exercise any trade or profession must bring to the exercise of it such a measure of skill and knowledge as will suffice for reasonable efficiency, and he who has less than this practises at his own risk. The ignorant physician who kills his patient, or the unskilful blacksmith who lames the horse shod by him, is legally responsible, not because he is ignorant or unskilful—for skill and knowledge may be beyond his reach—but because, being unskilful or ignorant, he ventures to undertake a business which calls for qualities which he does not possess. No man is bound in law to be a good surgeon or a capable attorney, but all men are bound not to act as surgeons or attorneys until and unless they are good and capable as such.

(*d*) Inst. Just. 4. 3. 7.

The unskilful physician, therefore, is liable not because he is now careless of the health of his patient, but because he was formerly careless in undertaking work calling for greater skill than he possessed. If he then knew that he had not the requisite skill, his carelessness is obvious. Possibly, however, he believed himself to be sufficiently qualified. In this case we must go one step further back in the search for that mental attitude of indifference which is the essential element in all cases of negligence. He was careless in forming his beliefs; he formed them without that anxious consideration which the law requires from those who form beliefs on which they act to the injury of others. A man may be called upon by the law to answer to-day for the carelessness with which he formed an opinion years ago.

§ 142. The Standard of Care.

Carelessness is not culpable, or a ground of legal liability, save in those cases in which the law has imposed a duty of carefulness. In all other cases complete indifference as to the interests of others is allowable. No general principle can be laid down, however, with regard to the existence of this duty, for this is a matter pertaining to the details of the concrete legal system, and not to abstract theory. Carelessness is lawful or unlawful, as the law sees fit to provide. In the criminal law liability for negligence is quite exceptional. Speaking generally, crimes are wilful wrongs, the alternative form of *mens rea* being deemed an insufficient ground for the rigour of criminal justice. This, however, is not invariably the case, negligent homicide, for example, being a criminal offence. In the civil law, on the other hand, no such distinction is commonly drawn between the two forms of *mens rea*. In general we may say that whenever an act would be a civil wrong if done intentionally, it is also a civil wrong if done negligently. When there is a legal duty not to do a thing on purpose, there is commonly a legal duty to take care not to do it accidentally. To this rule, however, there are certain exceptions—instances in which wrongful intent is the necessary basis even of civil liability. In these cases a person is civilly responsible for doing harm wilfully, but is not bound to take any care not to do it. He must not, for example, deceive another by any wilful falsehood, but unless there is some special ground of obligation in the case, he is not answerable for false statements which he honestly believes to be true, however negligent he may be in making them (*e*). Other instances of the same sort are based upon the express or implied agreement or understanding of the persons concerned. Thus the gratuitous lender of a chattel is bound to disclose any dangerous defects which he actually knows of, but is not bound to take any care whatever to see that it is safe, or to discover and disclose defaults of which he is ignorant. For he who borrows a thing gratuitously agrees impliedly to take it as it is, and to run all risks. But he who hires a thing for money is entitled to the exercise of due care for his safety on the part of the owner (*f*).

Carelessness may exist in any degree, and in this respect it differs from the other form of *mens rea*. Intention either exists or it does not; there can be no question of the degree in which it is present. The degree of carelessness varies directly with the risk to which other persons are exposed by the act in question. He is careless, who, without intending evil, nevertheless exposes others to the danger of it, and the greater the danger the greater the carelessness. The risk depends, in its turn, on two things: first, the magnitude of the threatened evil, and second, the probability of it. The greater the evil is, and the nearer it is, the greater is the indifference or carelessness of him who creates the danger.

Inasmuch, therefore, as carelessness varies in degree, it is necessary to know what degree of it is requisite to constitute culpable negligence. What measure of care does the law demand? What amount of anxious consideration for the interests of others is a legal duty, and within what limits is indifference lawful?

We have first to notice a possible standard of care which

(*e*) *Derry* v. *Peek*, 14 A. C. 337; *Le Lievre* v. *Gould*, (1893) 1 Q. B. 491.

(*f*) *Macarthy* v. *Young*, 6 H. & N. 329; *Coughlin* v. *Gillison*, (1899) 1 Q. B. 145. Similarly an arbitrator is liable for fraud, but not for negligence or want of skill. *Tharsis Sulphur and Copper Co.* v. *Loftus*, L. R. 8 C. P. 1.

the law might have adopted but has not. It does not demand the highest degree of care of which human nature is capable. I am not liable for harm ignorantly done by me, merely because by some conceivable exercise of prudential foresight I might have anticipated the event and so avoided it. Nor am I liable because, knowing the possibility of harm, I fail to take every possible precaution against it. The law demands not that which is possible, but that which is reasonable in view of the magnitude of the risk. Were men to act on any other principle than this, excess of caution would paralyse the business of the world. The law, therefore, allows every man to expose his fellows to a certain measure of risk, and to do so even with full knowledge. If an explosion occurs in my powder mill, I am not liable for negligence, even though I established and carried on the industry with full knowledge of its dangerous character. This is a degree of indifference to the safety of other men's lives and property which the law deems permissible because not excessive. Inasmuch as the carrying of firearms and the driving of horses are known to be the occasions of frequent harm, extreme care and the most scrupulous anxiety as to the interests of others would prompt a man to abstain from those dangerous forms of activity. Yet it is expedient in the public interest that those activities should go on, and therefore that men should be exposed to the incidental risks of them. Consequently the law does not insist on any standard of care which would include them within the limits of culpable negligence. It is for the law to draw the line as best it can, so that while prohibiting unreasonable carelessness, it does not at the same time demand unreasonable care.

On the other hand it is not sufficient that I have acted in good faith to the best of my judgment and belief, and have used as much care as I myself believed to be required of me in the circumstances of the case. The question in every case is not whether I honestly thought my conduct sufficiently careful, but whether in fact it attained the standard of due care established by law.

What standard then does the law actually adopt? It demands the amount of care which is reasonable in the circumstances of the particular case (*g*). This obligation to use reasonable care is very commonly expressed by reference to the conduct of a "reasonable man" or of an "ordinarily prudent man," meaning thereby a reasonably prudent man. "Negligence," it has been said (*h*), "is the omitting to do something that a reasonable man would do, or the doing something which a reasonable man would not do." "We ought," it has been said (*i*), "to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe. . . . The care taken by a prudent man has always been the rule laid down."

What amounts to reasonable care depends entirely on the circumstances of the particular case as known to the person whose conduct is the subject of inquiry. Whether in those circumstances, as so known to him, he used due care—whether he acted as a reasonably prudent man—is in general a mere question of fact as to which no legal rules can be laid down. It would seem clear, however, that for the proper determination of this question of fact there are two chief matters for consideration. The first is the magnitude of the risk to which other persons are exposed, while the second is the importance of the object to be attained by the dangerous form of activity. The reasonableness of any conduct will depend upon the proportion between these two elements. To expose others to danger for a disproportionate object is unreasonable, whereas an equal risk for a better cause may lawfully be run without negligence. By driving trains at the rate of fifty miles an hour, railway companies have caused many fatal accidents which could quite easily have been avoided by reducing the speed to ten miles, but this additional safety would be attained at too great a cost of public convenience, and therefore in neglecting this precaution the companies do not fall below the standard of reasonable care and are not guilty of negligence (*k*).

(*g*) *Ford* v. *L. & S. W. Railway Co.*, (1862) 2 F. & F. 730.
(*h*) *Blyth* v. *Birmingham Water Works Co.*, (1856) 25 L. J. Ex. p. 213.
(*i*) *Vaughan* v. *Menlove*, (1837) 3 Bing. N. C. p. 475.
(*k*) *Ford* v. *L. & S. W. Railway Co.*, (1862) 2 F. & F. 730.

§ 143. Degrees of Negligence.

We have said that English law recognises only one standard of care and therefore only one degree of negligence. Whenever a person is under a duty to take any care at all, he is bound to take that amount of it which is deemed reasonable under the circumstances; and the absence of this care is culpable negligence. Although this is probably a correct statement of English law, attempts have been made to establish two or even three distinct standards of care and degrees of negligence. Some authorities, for example, distinguish between gross negligence (*culpa lata*) and slight negligence (*culpa levis*), holding that a person is sometimes liable for the former only, and at other times even for the latter. In some cases we find even a threefold distinction maintained, negligence being either gross, ordinary, or slight (*l*). These distinctions are based partly upon Roman law, and partly upon a misunderstanding of it, and notwithstanding some judicial *dicta* to the contrary we may say with some confidence that no such doctrine is known to the law of England (*m*). The distinctions so drawn are hopelessly indeterminate and impracticable. On what principle are we to draw the line between gross negligence and slight? How can we thus elevate a distinction of degree into one of kind? Even were it possible to establish two or more standards, there seems no reason of justice or

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(*l*) See, for example, Smith's Leading Cases, I. 228, 10th ed. (Notes to *Coggs* v. *Bernard*).

(*m*) *See Hinton* v. *Dibbin*, 2 Q. B. at p. 661, per Denman, C.J.: "It may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists." *Wilson* v. *Brett*, 11 M. & W. at p. 113, per Rolfe, B.: "I said I could see no difference between negligence and gross negligence, that it was the same thing with the addition of a vituperative epithet." *Grill* v. *General Iron Screw Colliery Co.*, L. R. 1 C. P. at p. 612, per Willes J.: "No information has been given us as to the meaning to be attached to gross negligence in this case, and I quite agree with the dictum of Lord Cranworth in *Wilson* v. *Brett* that gross negligence is ordinary negligence with a vituperative epithet, a view held by the Exchequer Chamber in *Beal* v. *South Devon Ry. Co.*" *Doorman* v. *Jenkins*, 2 Ad. & El. at p. 265, per Denman, C.J.: "I thought and I still think it impossible for a judge to take upon himself to say whether negligence is gross or not." Pollock's Torts, p. 462, 10th ed. Street's Foundations of Legal Liability, I. p. 28. See, however, for a full discussion of the matter, and an expression of the contrary opinion, Beven on Negligence, Book I. ch. II.

expediency for doing so. The single standard of English law is sufficient for all cases. Why should any man be required to show more care than is reasonable under the circumstances, or excused if he shows less?

In connection with this alleged distinction between gross and slight negligence it is necessary to consider the celebrated doctrine of Roman law to the effect that the former (*culpa lata*) is equivalent to wrongful intention (*dolus*)—a principle which receives occasional expression and recognition in English law also. *Magna culpa dolus est* (*n*), said the Romans. In its literal interpretation, indeed, this is untrue, for we have already seen that the two forms of *mens rea* are wholly inconsistent with each other, and that no degree of carelessness can amount to design or purpose. Yet the proposition, though inaccurately expressed, has a true signification. Although *real* negligence, however gross, cannot amount to intention, *alleged* negligence may. Alleged negligence which, if real, would be exceedingly gross, is probably not negligence at all, but wrongful purpose. Its grossness raises a presumption against its reality. For we have seen that carelessness is measured by the magnitude and imminence of the threatened mischief. Now the greater and more imminent the mischief, the more probable is it that it is intended. Genuine indifference and carelessness is very unusual and unlikely in extreme cases. Men are often enough indifferent as to remote or unimportant dangers to which they expose others, but serious risks are commonly avoided by care unless the mischief is desired and intended. The probability of a result tends to prove intention and therefore to disprove negligence. If a new-born child is left to die from want of medical attention or nursing, it *may* be that its death is due to negligence only, but it is more probable that it is due to wrongful purpose and malice aforethought. He who strikes another on the head with an iron bar *may* have meant only to wound or stun, and not to kill him, but the probabilities are the other way (*o*).

(*n*) D. 50. 16. 226. See also D. 17. 1. 29. pr. D. 47. 4. 1. 2. D. 11. 6. 1. 1.; *Lata culpa plane dolo comparabitur.*

(*o*) In *Le Lievre* v. *Gould*, (1893) 1 Q. B. at p. 500, it is said by Lord Justice Bowen: "If the case had been tried with a jury, the judge would

In certain cases, as has already been indicated in dealing with the nature of intention, the presumption of fact that a person intends the probable consequences of his actions has hardened into a presumption of law and become irrebuttable. In those cases that which is negligence in fact is deemed wrongful intent in law. It is constructive, though not actual intent. The law of homicide supplies us with an illustration. Murder is wilful homicide, and manslaughter is negligent homicide, but the boundary line as drawn by the law is not fully coincident with that which exists in fact. Much that is merely negligent in fact is treated as wilful homicide in law. An intent to cause grievous bodily harm is imputed as an intent to kill, if death ensues, and an act done with knowledge that it will probably cause death is in law an act done with intent to cause it. The justification of such conclusive presumptions of intent is twofold. In the first place, as already indicated, very gross negligence is probably in truth not negligence at all, but wrongful purpose; and in the second place, even if it is truly negligence, yet by reason of its grossness it is as bad as intent, in point of moral deserts, and therefore may justly be treated and punished as if it were intent. The law, accordingly, will sometimes say to a defendant: "Perhaps, as you allege, you were merely negligent and had no actual wrongful purpose; nevertheless you will be dealt with just as if you had, and it will be conclusively presumed against you that your act was wilful. For your deserts are no better than if you had in truth intended the mischief which you have so recklessly caused. Moreover it is exceedingly probable, notwithstanding your disclaimer, that you did indeed intend it; therefore no endeavour will be made on your behalf to discover whether you did or not."

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have pointed out to them that gross negligence might amount to evidence of fraud, if it were so gross as to be incompatible with the idea of honesty, but that even gross negligence, in the absence of dishonesty, did not of itself amount to fraud." Literally read, this implies that, though gross negligence cannot *be* fraud, it may be *evidence* of it, but this of course is impossible. If two things are inconsistent with each other, one of them cannot be evidence of the other. The true meaning is that alleged or admitted negligence may be so gross as to be a ground for the inference that it is in reality fraud and not negligence at all; see also *Kettlewell* v. *Watson*, 21 Ch. D. at p. 706, per Fry, J.

§ 144. Other Theories of Negligence.

The analysis of the conception of negligence is a matter of some considerable difficulty, and it is advisable to take account of certain theories which differ more or less seriously from that which has here been accepted by us.

It is held by some, that negligence consists essentially in inadvertence. It consists, that is to say, in a failure to be alert, circumspect, or vigilant, whereby the true nature, circumstances, and consequences of a man's acts are prevented from being present in his consciousness. The wilful wrongdoer is he who knows that his act is wrong: the negligent wrongdoer is he who does not know it, but would have known it, were it not for his mental indolence (*p*).

This explanation contains an important element of the truth, but it is inadequate. For in the first place, as has been already pointed out, all negligence is not inadvertent. There is such a thing as wilful or advertent negligence, in which the wrongdoer knows perfectly well the true nature, circumstances, and probable consequences of his act. He foresees those consequences, and yet does not intend them, and therefore cannot be charged with wilful wrongdoing in respect of them. His mental attitude with regard to them is not intention, but a genuine form of negligence, of which the theory of inadvertence can give no explanation.

In the second place, all inadvertence is not negligence. A failure to appreciate the nature of one's act, and to foresee its consequences, is not in itself culpable. It is no ground of responsibility, unless it is due to carelessness in the sense of undue indifference. He who is ignorant or forgetful, notwithstanding a genuine desire to attain knowledge or remembrance, is not negligent. The signalman who sleeps at his post is negligent, not because he falls asleep, but because he is not sufficiently anxious to remain awake. If his sleep is the unavoidable result of illness or excessive labour, he is free from blame. The essence of negligence, therefore, is not

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(*p*) Austin, Lecture XX.; Birkmeyer, Strafrecht, sect. 17; Clark, Analysis of Criminal Liability, ch. 9.

inadvertence—which may or may not be due to carelessness—but carelessness—which may or may not result in inadvertence.

It may be suggested in defence of the theory of inadvertence that there are in reality three forms of the *mens rea*, and not two only: namely, (1) intention, when the consequences are foreseen and intended, (2) recklessness, when they are foreseen but not intended, and (3) negligence, when they are neither foreseen nor intended. The law, however, rightly classes the second and third of these together under the head of negligence, for they are identical in their essential nature, each of them being blameworthy only so far as it is the outcome of carelessness.

We have now to consider another explanation which may be termed the objective theory of negligence. It is held by some that negligence is not a subjective, but an objective fact. It is not a particular state of mind or form of the *mens rea* at all, but a particular kind of conduct. It is a breach of the duty of taking care, and to take care means to take precautions against the harmful results of one's actions, and to refrain from unreasonably dangerous kinds of conduct (*q*). To drive at night without lights is negligence, because to carry lights is a precaution taken by all reasonable and prudent men for the avoidance of accidents. To take care, therefore, is no more a mental attitude or state of mind than to take cold is. This, however, is not a correct analysis. Carelessness may *result* in a failure to take necessary precautions, or to refrain from dangerous activities, but it is not the same thing, just as it may result in inadvertence but is not the same thing. The neglect of needful precautions or the doing of unreasonably dangerous acts is not necessarily wrongful at all, for it may be due to inevitable mistake or accident. And on the other hand, even when it is wrongful, it may be wilful instead of negligent. A trap door may be left unbolted, in order that one's enemy may fall through it and so die.

(*q*) Clerk and Lindsell, Torts, p. 493, 6th ed.: "Negligence is the omission to take such care as under the circumstances it is the legal duty of a person to take. It is in no sense a positive idea, and has nothing to do with a state of mind." *Cf.* Pollock, Torts, pp. 454—462, 10th ed.

Poison may be left unlabelled, with intent that some one may drink it by mistake. A ship captain may wilfully cast away his ship by the neglect of the ordinary rules of good seamanship. A father who neglects to provide medicine for his sick child may be guilty of wilful murder, rather than of mere negligence. In none of these cases, nor indeed in any others, can we distinguish between intentional and negligent wrongdoing, save by looking into the mind of the offender and observing his subjective attitude towards his act and its consequences. Externally and objectively, the two classes of offences are indistinguishable. Negligence is the opposite of wrongful intention, and since the latter is a subjective fact the former must be such also.

SUMMARY.

The nature of Intention:
    Foresight accompanied by desire.
Intention distinguished from expectation.
    Intended consequences not always expected.
    Expected consequences not always intended.
Constructive intention.
Intention { Immediate.
    Ulterior—Motive.
Malice—wrongful intention.
    Ambiguity of the term "malice," which relates either to the immediate or remote intention.
Concurrent motives.
The irrelevance of motives in law.
    Exceptions to this principle.
The theory of criminal attempts.
    The four stages of a completed crime: Intention, preparation, attempt, completion.
    Distinction between preparation and attempt.
    Attempts by impossible means.
The jus necessitatis.
    Its theory.
    Its partial allowance in practice.
The nature of Negligence.
    Subjective and objective uses of the term.
    Negligence and intention opposed and inconsistent.
    Negligence not necessarily inadvertence.
    Negligence essentially indifference.

Negligence and intention the two alternative grounds of penal liability.

Negligence { Wilful or advertent.
  Simple or inadvertent.

Negligence immediate and remote.

Negligence and want of skill.

The duty of carefulness:
  The necessary basis of liability for negligence.
  When it exists in the criminal and civil law.

The standard of care:
  Not the highest possible.
  That of the reasonably careful man.

Degrees of negligence.
  Distinction between gross and slight negligence not recognised by English law.

Culpa lata dolus est.
  Significance of this proposition.
  Negligence and constructive intent.

Criticism of other theories of negligence:
  (1) That negligence is inadvertence.
  (2) The objective theory.

CHAPTER XIX.

LIABILITY (*continued*).

§ 145. Wrongs of Absolute Liability.

We now proceed to consider the third class of wrongs, namely those of absolute liability. These are the acts for which a man is responsible irrespective of the existence of either wrongful intent or negligence (*a*). They are the exceptions to the rule, *Actus non facit reum nisi mens sit rea.* It may be thought, indeed, that in the civil as opposed to the criminal law, absolute liability should be the rule rather than the exception. It may be said: "It is clear that in the criminal law liability should in all ordinary cases be based upon the existence of *mens rea.* No man should be punished criminally unless he knew that he was doing wrong, or might have known it by taking care. Inevitable mistake or accident should be a good defence for him. But why should the same principle apply to civil liability? If I do another man harm, why should I not be made to pay for it? What does it matter to him whether I did it wilfully, or negligently, or by inevitable accident? In either case I have actually done the harm, and therefore should be bound to *undo* it by paying compensation. For the essential aim of civil proceedings is redress for harm suffered by the plaintiff, not punishment for wrong done by the defendant; therefore the rule of *mens rea* should be deemed inapplicable."

It is clear, however, that this is not the law of England, and it seems equally clear that there is no sufficient reason

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(*a*) The next few pages seem to assume, as is commonly enough done, that every civil wrong—even cattle-trespass—must in legal contemplation be the *act* of some wrong*doer*, to wit, the person legally responsible. This standpoint squares, of course, with the analysis, adopted in § 128, of an *act* as comprising both an activity and the consequences thereof. That it is difficult to preserve appears in § 148, where acts *done* accidentally (p. 429) presently resolve themselves (p. 430) into acts *done* at the doer's peril and accidents that thereupon *happen*. That it is not historically necessary appears on p. 431. The student, indeed, may come to prefer the alternative analysis noticed on p. 384.

why it should be. In all those judicial proceedings which fall under the head of penal redress, the determining purpose of the law is not redress, but punishment. Redress is in those cases merely the instrument of punishment. In itself it is not a sufficient ground or justification for such proceedings at all. Unless damages are at the same time a deserved penalty inflicted upon the defendant, they are not to be justified as being a deserved recompense awarded to the plaintiff. For they in no way undo the wrong or restore the former state of things. The wrong is done and cannot be undone. If by accident I burn down another man's house, the only result of enforcing compensation is that the loss has been transferred from him to me; but it remains as great as ever for all that. The mischief done has been in no degree abated. If I am not in fault, there is no more reason why I should insure other persons against the harmful issues of my own activity, than why I should insure them against lightning or earthquakes. Unless some definite gain is to be derived by transferring loss from one head to another, sound reason, as well as the law, requires that the loss should lie where it falls (*b*).

Although the requirement of *mens rea* is general throughout the civil and criminal law, there are numerous exceptions to it. The considerations on which these are based are various, but the most important is the difficulty of procuring adequate proof of intention or negligence. In the majority of instances, indeed, justice requires that this difficulty be honestly faced; but in certain special cases it is allowable to circumvent it by means of a conclusive presumption of the presence of this condition of liability. In this way we shall certainly punish some who are innocent, but in the case of civil liability this is not a very serious matter—since men know that in such cases they act at their peril, and are content to take the risk—while in respect of criminal liability such a presumption is seldom resorted to, and only in the case of comparatively trivial offences (*c*). Whenever, therefore, the

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(*b*) The question is discussed in Holmes's Common Law, pp. 81—96, and in Pollock's Law of Torts, pp. 142—155, 10th ed.

(*c*) As to *mens rea* in criminal responsibility, see *Reg.* v. *Tolson*, 23 Q. B. D. 168; *Reg.* v. *Prince*, L. R. 2 C. C. 154; *Chisholm* v. *Doulton*, 22 Q. B. D. 736.

strict doctrine of *mens rea* would too seriously interfere with the administration of justice by reason of the evidential difficulties involved in it, the law tends to establish a form of absolute liability.

In proceeding to consider the chief instances of this kind of liability we find that the matter falls into three divisions, namely—(1) Mistake of Law, (2) Mistake of Fact, and (3) Accident.

§ 146. Mistake of Law.

It is a principle recognised not only by our own but by other legal systems that ignorance of the law is no excuse for breaking it. *Ignorantia juris neminem excusat.* The rule is also expressed in the form of a legal presumption that every one knows the law. The rule is absolute, and the presumption irrebuttable. No diligence of inquiry will avail against it; no inevitable ignorance or error will serve for justification. Whenever a man is thus held accountable for breaking a law which he did not know, and which he could not by due care have acquired a knowledge of, the case is one of absolute liability.

The reasons rendered for this somewhat rigorous principle are three in number. In the first place, the law is in legal theory definite and knowable; it is the duty of every man to know that part of it which concerns him; therefore innocent and inevitable ignorance of the law is impossible. Men are conclusively presumed to know the law, and are dealt with as if they did know it, because they can and ought to know it.

In the second place, even if invincible ignorance of the law is in fact possible, the evidential difficulties in the way of the judicial recognition of such ignorance are insuperable, and for the sake of any benefit derivable therefrom it is not advisable to weaken the administration of justice by making liability dependent on well-nigh inscrutable conditions touching knowledge or means of knowledge of the law. Who can say of any man whether he knew the law, or whether during the course of his past life he had an opportunity of acquiring a knowledge of it by the exercise of due diligence?

Thirdly and lastly, the law is in most instances derived from and in harmony with the rules of natural justice. It is a public declaration by the state of its intention to maintain by force those principles of right and wrong which have already a secure place in the moral consciousness of men. The common law is in great part nothing more than common honesty and common sense. Therefore although a man may be ignorant that he is breaking the law, he knows very well in most cases that he is breaking the rule of right. If not to his knowledge lawless, he is at least dishonest and unjust. He has little ground of complaint, therefore, if the law refuses to recognise his ignorance as an excuse, and deals with him according to his moral deserts. He who goes about to harm others when he believes that he can do so within the limits of the law, may justly be required by the law to know those limits at his peril. This is not a form of activity that need be encouraged by any scrupulous insistence on the formal conditions of legal responsibility.

It must be admitted, however, that while each of these considerations is valid and weighty, they do not constitute an altogether sufficient basis for so stringent and severe a rule (*d*). None of them goes the full length of the rule. That the law is knowable throughout by all whom it concerns is an ideal rather than a fact in any system as indefinite and mutable as our own. That it is impossible to distinguish invincible from negligent ignorance of the law is by no means wholly true. It may be doubted whether this inquiry is materially more difficult than many which courts of justice undertake without hesitation. That he who breaks the law of the land disregards at the same time the principles of justice and honesty is in many instances far from the truth. In a complex legal system a man requires other guidance than that of common sense and a good conscience. The fact seems to be that the rule in question, while in general sound, does not in its full extent and uncompromising rigidity admit of any sufficient justification.

(*d*) The rule is not limited to civil and criminal liability, but extends to all other departments of the law. It prevents, for example, the recovery of money paid under a mistake of law, though that which is paid under a mistake of fact may be reclaimed.

§ 147. Mistake of Fact.

In respect of the influence of ignorance or error upon legal liability, we have inherited from Roman law a familiar distinction between law and fact. By reason of his ignorance of the law no man will be excused, but it is commonly said that inevitable ignorance of fact is a good defence (*e*). This, however, is far from an accurate statement of English law. It is much more nearly correct to say that mistake of fact is an excuse only within the sphere of the criminal law, while in the civil law responsibility is commonly absolute in this respect. So far as civil liability is concerned, it is a general principle of our law that he who intentionally interferes with the person, property, reputation, or other rightful interests of another does so at his peril, and will not be heard to allege that he believed in good faith and on reasonable grounds in the existence of some circumstance which justified his act. If I trespass upon another man's land, it is no defence to me that I believed it on good grounds to be my own. If in absolute innocence and under an inevitable mistake of fact I meddle with another's goods, I am liable for all loss incurred by the true owner (*f*). If, intending to arrest A., I arrest B. by mistake instead, I am absolutely liable to him, notwithstanding the greatest care taken by me to ascertain his identity. If I falsely but innocently make a defamatory statement about another, I am liable to him, however careful I may have been to ascertain the truth. There are, indeed, exceptions to this rule of absolute civil liability for mistake of fact, but they are not of such number or importance as to cast any doubt on the validity of the general principle.

In the criminal law, on the other hand, the matter is otherwise, and it is here that the contrast between mistake of law and mistake of fact finds its true application. Absolute criminal responsibility for a mistake of fact is quite exceptional. An instance of it is the liability of him who abducts a girl

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(*e*) *Regula est juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere.* D. 22. 6. 9. pr.

(*f*) *Hollins* v. *Fowler*, L. R. 7 H. L. 757; *Consolidated Co.* v. *Curtis*, (1892) 1 Q. B. 495.

under the legal age of consent. Inevitable mistake as to her age is no defence; he must take the risk (*g*).

A word may be said as to the historical origin of this failure of English law to recognise inevitable mistake as a ground of exemption from civil liability. Ancient modes of procedure and proof were not adapted for inquiries into mental conditions. By the practical difficulties of proof early law was driven to attach exclusive importance to overt acts. The subjective elements of wrongdoing were largely beyond proof or knowledge, and were therefore disregarded as far as possible. It was a rule of our law that intent and knowledge were not matters that could be proved or put in issue. "It is common learning," said one of the judges of King Edward IV., "that the intent of a man will not be tried, for the devil himself knoweth not the intent of a man" (*h*). The sole question which the courts would entertain was whether the defendant did the act complained of. Whether he did it ignorantly or with guilty knowledge was entirely immaterial. This rule, however, was restricted to civil liability. It was early recognised that criminal responsibility was too serious a thing to be imposed upon an innocent man simply for the sake of avoiding a difficult inquiry into his knowledge and intention. In the case of civil liability, on the other hand, the rule was general. The success with which it has maintained itself in modern law is due in part to its undeniable utility in obviating inconvenient or even impracticable inquiries, and in part to the influence of the conception of redress in minimising the importance of the formal condition of penal liability.

§ 148. Accident.

Unlike mistake, inevitable accident is commonly recognised by our law as a ground of exemption from liability. It is needful, therefore, to distinguish accurately between these two things, for they are near of kin. Every act which is not done intentionally is done either accidentally or by mistake. It is done accidentally when it is unintentional in respect of its *consequences*. It is done by mistake, when it is intentional in respect of its consequences, but unintentional in respect of some material *circumstance*. If I drive over a man in the dark, because I do not know that he is in the road, I injure him accidentally; but if I procure his arrest, because I mistake

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(*g*) *Reg.* v. *Prince*, L. R. 2 C. C. 154.
(*h*) Y. B. 17 Edw. IV. 2.

him for some one who is liable to arrest, I injure him, not accidentally, but by mistake. In the former case I did not intend the harm at all, while in the latter case I fully intended it, but falsely believed in the existence of a circumstance which would have served to justify it. So if by insufficient care I allow my cattle to escape into my neighbour's field, their presence there is due to accident; but if I put them there because I wrongly believe that the field is mine, their presence is due to mistake. In neither case did I intend to wrong my neighbour, but in the one case my intention failed as to the consequence, and in the other as to the circumstance.

Accident, like mistake, is either culpable or inevitable. It is culpable when due to negligence, but inevitable when the avoidance of it would have required a degree of care exceeding the standard demanded by the law. Culpable accident is no defence, save in those exceptional cases in which wrongful intent is the exclusive and necessary ground of liability. Inevitable accident is commonly a good defence, both in the civil and in the criminal law.

To this rule, however, there are, at least in the civil law, important exceptions. These are cases in which the law insists that a man shall act at his peril, and shall take his chance of accidents happening. If he desires to keep wild beasts (*i*), or to light fires (*j*), or to construct a reservoir of water (*k*), or to accumulate upon his land any substance which will do damage to his neighbours if it escapes (*l*), or to erect dangerous structures by which passengers in the highway may come to harm (*m*), he will do all these things *suo periculo* (though none of them are *per se* wrongful), and will answer for all ensuing damage, notwithstanding consummate care.

There is one case of absolute liability for accident which deserves special notice by reason of its historical origin. Every man is absolutely responsible for the trespasses of his cattle. If my horse or my ox escapes from my land to that of another man, I am answerable for it without any proof of negli-

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(*i*) *Filburn* v. *Aquarium Co.*, 25 Q. B. D. 258.
(*j*) *Black* v. *Christchurch Finance Co.*, (1894) A. C. 48.
(*k*) *Rylands* v. *Fletcher*, L. R. 3 H. L. 330.
(*l*) *Pickard* v. *Smith*, 10 C. B. N. S. 470.
(*m*) *Ellis* v. *Loftus Iron Co.*, L. R. 10 C. P. 10.

gence (*m*). Such a rule may probably be justified as based on a reasonable presumption of law that all such trespasses are the outcome of negligent keeping. Viewed historically, however, the rule is worth notice as one of the last relics of the ancient principle that a man is answerable for all damage done by his property. In the theory of ancient law I am liable for the trespasses of my cattle, not because of my negligent keeping of them, but because of my ownership of them. For the same reason in Roman law a master was liable for the offences of his slaves. The case is really, in its historical origin, one of vicarious liability. In early law and custom vengeance, and its products, responsibility and punishment, were not conceived as necessarily limited to human beings, but were in certain cases extended to dumb animals and even inanimate objects. We have already cited in another connection the provision of the Mosaic law that "If an ox gore a man or a woman that they die, then the ox shall be surely stoned and his flesh shall not be eaten" (*n*). In the *Laws* of Plato it is said (*o*): "If a beast of burden or other animal cause the death of any one . . . the kinsman of the deceased shall prosecute the slayer for murder, and the wardens of the country . . . shall try the cause; and let the beast when condemned be slain by them, and cast beyond the borders." So in the Laws of King Alfred (*p*): "If at their common work," (of wood cutting) "one man slay another unwilfully, let the tree be given to the kindred." And by English law, until the year 1846, the weapon or other thing which "moved to the death of a man" was forfeited to the King as guilty and accursed (*q*). Here we have the ground of a rule of absolute liability. If a man's cattle or his slaves do damage, they are thereby exposed to the vengeance of the injured person. But to take destructive vengeance upon *them* is to impose a penalty upon their *owner*. The liability thence resulting probably passed through three stages: first, that of unconditional forfeiture or surrender of the property

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(*m*) See note (*m*), p. 430.

(*n*) Exodus xxi. 28.

(*o*) Laws, 873.

(*p*) Thorpe, Ancient Laws and Institutes of England, I. p. 71, sect. 13.

(*q*) 9 & 10 Vict. c. 62; Blackstone, I. 300.

to the vengeance of the injured person; secondly, that of an option given to the owner between forfeiture and redemption—the *actiones noxales* of Roman law (*r*); and thirdly, that of compulsory redemption, or in other words, unconditional compensation.

§ 149. Vicarious Responsibility.

Hitherto we have dealt exclusively with the conditions of liability, and it is needful now to consider its incidence. Normally and naturally the person who is liable for a wrong is he who does it. Yet both ancient and modern law admit instances of vicarious liability in which one man is made answerable for the acts of another. Criminal responsibility, indeed, is never vicarious at the present day, except in very special circumstances and in certain of its less serious forms (*s*). In more primitive systems, however, the impulse to extend vicariously the incidence of liability receives free scope in a manner altogether alien to modern notions of justice. It is in barbarous times considered a very natural thing to make every man answerable for those who are kin to him. In the Mosaic legislation it is deemed necessary to lay down the express rule that "The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers; every man shall be put to death for his own sin" (*t*). Plato in his *Laws* does not deem it needless to emphasise the same principle (*u*). Furthermore, so long as punishment is conceived rather as expiative, retributive, and vindictive, than as deterrent and reformative, there seems no reason why the incidence of liability should not be determined by *consent*, and therefore why a guilty man should not provide a substitute to bear his penalty and to provide the needful satisfaction to the law. Guilt must be wiped out by punishment, but there is no reason why the victim should be one

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(*r*) Inst. Just. 4. 8. and 4. 9.

(*s*) *Chisholm* v. *Doulton*, 22 Q. B. D. 736; *Parker* v. *Alder*, (1899) 1 Q. B. 20.

(*t*) Deut. xxiv. 16.

(*u*) Laws, 856. On the vicarious responsibility of the kindred in early law, see Lea, Superstition and Force, pp. 13—20, 4th ed., and Tarde, La Philosophie Pénale, pp. 136—140.

person rather than another. Such modes of thought have long since ceased to pervert the law; but that they were at one time natural is rendered sufficiently evident by their survival in popular theology.

Modern civil law recognises vicarious liability in two chief classes of cases. In the first place, masters are responsible for the acts of their servants done in the course of their employment. In the second place, representatives of dead men are liable for deeds done in the flesh by those whom they represent. We shall briefly consider each of these two forms.

It has been sometimes said that the responsibility of a master for his servant has its historical source in the responsibility of an owner for his slave. This, however, is certainly not the case. The English doctrine of employer's liability is of comparatively recent growth. It has its origin in the legal presumption, gradually become conclusive, that all acts done by a servant in and about his master's business are done by his master's express or implied authority, and are therefore in truth the acts of the master for which he may be justly held responsible (x). No employer will be allowed to say that he did not authorise the act complained of, or even that it was done against his express injunctions, for he is liable none the less. This conclusive presumption of authority has now, after the manner of such presumptions, disappeared from the law, after having permanently modified it by establishing the principle of employer's liability. Historically, as we have said, this is a fictitious extension of the principle, *Qui facit per alium facit per se*. Formally, it has been reduced to the laconic maxim, *Respondeat superior*.

The rational basis of this form of vicarious liability is in the first place evidential. There are such immense difficulties in the way of proving actual authority, that it is necessary to establish a conclusive presumption of it. A word, a gesture, or a tone may be a sufficient indication from a master to his servant that some lapse from the legal standard of care or honesty will be deemed acceptable service. Yet who could prove such a measure of complicity? Who could establish liability in such a case, were evidence of authority required, or evidence of the want of it admitted?

(x) Salmond, Essays in Jurisprudence and Legal History, pp. 161—163; Wigmore, Responsibility for Tortious Acts, Select Essays in Anglo-American Legal History, III. pp. 520—537; Street, Foundations of Legal Liability, II. ch. 41—43.

A further reason for the vicarious responsibility of employers is that employers usually are, while their servants usually are not, financially capable of the burden of civil liability. It is felt, probably with justice, that a man who is able to make compensation for the hurtful results of his activities should not be enabled to escape from the duty of doing so by delegating the exercise of these activities to servants or agents from whom no redress can be obtained. Such delegation confers upon impecunious persons means and opportunities of mischief which would otherwise be confined to those who are financially competent. It disturbs the correspondence which would otherwise exist between the capacity of doing harm and the capacity of paying for it. It is requisite for the efficacy of civil justice that this delegation of powers and functions should be permitted only on the condition that he who delegates them shall remain answerable for the acts of his servants, as he would be for his own.

A second form of vicarious responsibility is that of living representatives for the acts of dead men. There is no doubt that criminal responsibility must die with the wrongdoer himself, but with respect to penal redress the question is not free from difficulty. For in this form of liability there is a conflict between the requirements of the two competing principles of punishment and compensation. The former demands the termination of liability with the life of the wrongdoer, while the latter demands its survival. In this dispute the older common law approved the first of those alternatives. The received maxim was: *Actio personalis moritur cum persona*. A man cannot be punished in his grave; therefore it was held that all actions for penal redress, being in their true nature instruments of punishment, must be brought against the living offender and must die with him. Modern opinion rejects this conclusion, and by various statutory provisions the old rule has been in great part abrogated. It is considered that although liability to afford redress ought to depend in point of *origin* upon the requirements of punishment, it should depend in point of *continuance* upon those of compensation. For when this form of liability has once come into existence, it is a valuable right of the person wronged; and it is expedient that such rights should be held upon a secure tenure, and should not be subject to extinction by a mere irrelevant accident such as the death of the offender. There is no sufficient reason for drawing any distinction in point of survival between the right of a creditor to recover his debt and the right of a man who has been injured by assault or defamation to recover compensation for the loss so suffered by him.

As a further argument in the same sense, it is to be observed that it is not strictly true that a man cannot be punished after his death. Punishment is effective not at the time it is inflicted, but at the time it is threatened. A threat of evil to be inflicted upon a man's descendants at the expense of his estate will undoubtedly exercise a certain deterrent influence upon him; and the apparent injustice of so punishing his descendants for the offences of their predecessor is in most cases no more than apparent. The right of succession is merely the right to acquire the dead man's estate, subject to all charges which, on any grounds, and apart altogether from the interests of the successors themselves, may justly be imposed upon it.

There is a second application of the maxim, *Actio personalis moritur cum persona*, which seems equally destitute of justification. According to the common law an action for penal redress died not merely with the wrongdoer but also with the person wronged. This rule has been abrogated by statute in part only. There can, however, be little doubt that in all ordinary cases, if it is right to punish a person at all, his liability should not cease simply by reason of the death of him against whom his offence was committed. The right of the person injured to receive redress should descend to his representatives like any other proprietary interest.

§ 150. The Measure of Criminal Liability.

We have now considered the conditions and the incidence of penal liability. It remains to deal with the measure of it, and here we must distinguish between criminal and civil wrongs, for the principles involved are fundamentally different in the two cases.

In considering the measure of criminal liability it will be convenient to bestow exclusive attention upon the deterrent purpose of the criminal law, remembering, however, that the conclusions so obtained are subject to possible modification by reference to those subordinate and incidental purposes of punishment which we thus provisionally disregard.

Were men perfectly rational, so as to act invariably in accordance with an enlightened estimate of consequences, the question of the measure of punishment would present no difficulty. A draconian simplicity and severity would be perfectly just and perfectly effective. It would be possible to act on the Stoic paradox that all offences involve equal guilt, and to visit with the utmost rigour of the law every deviation, however slight, from the appointed way. In other words, if the deterrent effect of severity were certain and complete, the best law would be that which by the most extreme and undiscriminating severity effectually extinguished crime. Were human nature so constituted that a threat of burning all offenders alive would with certainty prevent all breaches of the law, then this would be the just and fitting penalty for all offences from high treason to petty larceny. So greatly, however, are men moved by the impulse of the moment, rather than by a rational estimate of future good and evil, and so ready are they to face any future evil which falls short of the inevitable, that the utmost rigour is sufficient only for the diminution of crime, not for the extinction of it. It is needful, therefore, in judging the merits of the law, to set against the sum of good which results from the partial prevention of offences, the sum of evil which results from the partial failure of prevention and the consequent necessity of fulfilling those threats of evil by which the law had hoped to effect its purpose. The perfect law is that in which the difference between the good and the evil is at a maximum in favour of the good, and the rules as to the measure of criminal liability are the rules for the attainment of this maximum. It is obvious that it is not attainable by an indefinite increase of severity. To substitute hanging for imprisonment as the punishment for petty theft would doubtless diminish the frequency of this offence, but it is certain that the evil so prevented would be far outweighed by that which the law would be called on to inflict in the cases in which its threats proved unavailing.

In every crime there are three elements to be taken into account in determining the appropriate measure of punishment. These are (1) the motives to the commission of the offence, (2) the magnitude of the offence, and (3) the character of the offender.

1. *The motive of the offence.* Other things being equal, the greater the temptation to commit a crime the greater should be the punishment. This is an obvious deduction from the first principles of criminal liability. The object of punishment is to counteract by the establishment of contrary and artificial motives the natural motives which lead to crime. The stronger these natural motives the stronger must be the counteractives which the law supplies. If the profit to be derived from an act is great, or the passions which lead men to it are violent, a corresponding strength or violence is an essential condition of the efficacy of repressive discipline. We shall see later, however, that this principle is subject to a very important limitation, and that there are many cases in which extreme temptation is a ground of extenuation rather than of increased severity of punishment.

2. *The magnitude of the offence.* Other things being equal, the greater the offence, that is to say the greater the sum of its evil consequences or tendencies, the greater should be its punishment. At first sight, indeed, it would seem that this consideration is irrelevant. Punishment, it may be thought, should be measured solely by the profit derived by the offender, not by the evils caused to other persons; if two crimes are equal in point of motive, they should be equal in point of punishment, notwithstanding the fact that one of them may be many times more mischievous than the other. This, however, is not so, and the reason is twofold.

(*a*) The greater the mischief of any offence the greater is the punishment which it is profitable to inflict with the hope of preventing it. For the greater this mischief the less is the proportion which the evil of punishment bears to the good of prevention, and therefore the greater is the punishment which can be inflicted before the balance of good over evil attains its maximum. Assuming the motives of larceny and of homicide to be equal, it may be profitable to inflict capital punishment for the latter offence, although it is certainly unprofitable to inflict it for the former. The increased measure of prevention that would be obtained by such severity would, in view of the comparatively trivial nature of the offence, be obtained at too great a cost.

(*b*) A second and subordinate reason for making punishment vary with the magnitude of the offence is that, in those cases in which different offences offer themselves as alternatives to the offender, an inducement is thereby given for the preference of the least serious. If the punishment of burglary is the same as that of murder, the burglar has obvious motives for not stopping at the lesser crime. If an attempt is punished as severely as a completed offence, why should any man repent of his half-executed purposes?

3. *The character of the offender.* The worse the character or disposition of the offender the more severe should be his punishment. Badness of disposition is constituted either by the strength of the impulses to crime, or by the weakness of the impulses towards law-abiding conduct. One man may be worse than another because of the greater strength and prevalence within him of such anti-social passions as anger, covetousness, or malice; or his badness may lie in a deficiency of those social impulses and instincts which are the springs of right conduct in normally constituted men. In respect of all the graver forms of law-breaking, for one man who abstains from them for fear of the law there are thousands who abstain by reason of quite other influences. Their sympathetic instincts, their natural affections, their religious beliefs, their love of the approbation of others, their pride and self-respect, render superfluous the threatenings of the law. In the degree in which these impulses are dominant and operative, the disposition of a man is good; in the degree in which they are wanting or inefficient, it is bad.

In both its kinds badness of disposition is a ground for severity of punishment. If a man's emotional constitution is such that normal temptation acts upon him with abnormal force, it is for the law to supply in double measure the counteractive of penal discipline. If he is so made that the natural influences towards well-doing fall below the level of average humanity, the law must supplement them by artificial influences of a strength that is needless in ordinary cases.

Any fact, therefore, which indicates depravity of disposition is a circumstance of aggravation, and calls for a penalty in excess of that which would otherwise be appropriate to the offence. One of the most important of these facts is the repetition of crime by one who has been already punished. The law rightly imposes upon habitual offenders penalties which bear no relation either to the magnitude or to the profit of the offence. A punishment adapted for normal men is not appropriate for those who, by their repeated defiance of it, prove their possession of abnormal natures. A second case in which the same principle is applicable is that in which the mischief of an offence is altogether disproportionate to any profit to be derived from it by the offender. To kill a man from mere wantonness, or merely in order to facilitate the picking of his pocket, is a proof of extraordinary depravity beyond anything that is imputable to him who commits homicide only through the stress of passionate indignation or under the influence of great temptation. A third case is that of offences from which normal humanity is adequately dissuaded by such influences as those of natural affection. To kill one's father is in point of magnitude no worse a crime than any other homicide, but it has at all times been viewed with greater abhorrence, and by some laws punished with greater severity, by reason of the depth of depravity which it indicates in the offender. Lastly it is on the same principle that wilful offences are punished with greater rigour than those which are due merely to negligence.

An additional and subordinate reason for making the measure of liability depend upon the character of the offender is that badness of disposition is commonly accompanied by deficiency of sensibility. Punishment must increase as sensibility diminishes. The more depraved the offender the less he feels the shame of punishment; therefore the more he must be made to feel the pain of it. A certain degree of even physical insensibility is said to characterise the more degraded orders of criminals; and the indifference with which death itself is faced by those who in the callousness of their hearts have not scrupled to inflict it upon others is a matter of amazement to normally constituted men.

We are now in a position to deal with a question which we have already touched upon but deferred for fuller consideration, namely the apparent paradox involved in the rule that punishment must increase with the temptation to the offence. As a general rule this proposition is true; but it is subject to a very important qualification. For in certain cases the temptation to which a man succumbs may be of such a nature as to rebut that presumption of bad disposition which would in ordinary circumstances arise from the commission of the offence. He may, for example, be driven to the act not by the strength of any bad or self-regarding motives, but by that of his social or sympathetic impulses. In such a case the greatness of the temptation, considered in itself, demands severity of punishment, but when considered as a disproof of the degraded disposition which usually accompanies wrongdoing it demands leniency; and the latter of these two conflicting considerations may be of sufficient importance to outweigh the other. If a man remains honest until he is driven in despair to steal food for his starving children, it is perfectly consistent with the deterrent theory of punishment to deal with him less severely than with him who steals from no other motive than cupidity. He who commits homicide from motives of petty gain, or to attain some trivial purpose, deserves to be treated with the utmost severity, as a man thoroughly callous and depraved. But he who kills another in retaliation for some intolerable insult or injury need not be dealt with according to the measure of his temptations, but should rather be excused on account of them.

§ 151. The Measure of Civil Liability.

Penal redress is that form of penal liability in which the law uses the compulsory compensation of the person injured as an instrument for the punishment of the offender. It is characteristic of this form of punishment that it takes account of one only of the three considerations which, as we have seen, rightly determine the measure of penal responsibility. It is measured exclusively by the magnitude of the offence, that is to say, by the amount of loss inflicted by it. It takes no account of the character of the offender, and so visits him who does harm through some trivial want of care with as severe a penalty as if his act had been prompted by deliberate malice. Similarly it takes no account of the motives of the offence; he who has everything and he who has nothing to gain are equally punished, if the damage done by them is equal. Finally, it takes no account of probable or intended consequences, but solely of those which actually ensue; wherefore the measure of a wrongdoer's liability is not the evil which he meant to do, but that which he has succeeded in doing; and his punishment is determined not by his fault, but by the accident of the result. If one man is dealt with more severely than another, it is not because he is more guilty, but because he has had the misfortune to be more successful in his wrongful purposes, or less successful in the avoidance of unintended issues.

Serious as are these lapses from the due standard of penal discipline, it is not to be suggested that this form of civil liability is unjustifiable. The use of redress as an instrument of punishment possesses advantages more than sufficient to counterbalance any such objections to it. More especially it possesses this, that while other forms of punishment, such as imprisonment, are uncompensated evil, penal redress is the gain of him who is wronged as well as the loss of the wrongdoer. Further, this form of remedy gives to the persons injured a direct interest in the efficient administration of justice—an interest which is almost absent in the case of the criminal law. It is true, however, that the law of penal redress, taken by itself, falls so far short of the requirements of a rational scheme of punishment that it would by itself be totally insufficient. In all modern and developed bodies of law its operation is supplemented, and its deficiencies made good, by a co-ordinate system of criminal liability. These two together, combined in due proportions, constitute a very efficient instrument for the maintenance of justice.

SUMMARY.

- Wrongs of absolute liability—*Mens rea* not required.
  - Exceptional nature of such wrongs.
    - Penal redress justified not as redress but as punishment.
  - Mistake of law.
    - Commonly no defence.
    - Reasons for the rule.
    - Criticism of it.
  - Mistake of fact.
    - A defence in criminal but commonly not in civil cases.
  - Accident.
    - Distinction between accident and mistake.
    - Accident and mistake
      - Culpable.
      - Inevitable.
    - Inevitable accident commonly a defence.
      - Exceptions.
- The Incidence of Penal Liability.
  - Vicarious liability.
    - 1. Employer's liability.
      - Its rational basis.
    - 2. Liability of representatives of dead men.
      - Its rational basis.
- The Measure of Penal Liability.
  - 1. Criminal liability.
    - Reasons against indiscriminate severity.
    - The end to be attained.
    - The considerations to be taken account of.
      - (*a*) The motive of the offence.
      - (*b*) The magnitude of the offence.
      - (*c*) The character of the offender.
  - 2. Civil liability.
    - Merits and demerits of the use of compulsory compensation as an instrument of punishment.

CHAPTER XX.

THE LAW OF PROPERTY.

§ 152. Meanings of the Term Property.

The substantive civil law (*a*) is divisible into three great departments, namely the law of property, the law of obligations, and the law of status. The first deals with proprietary rights *in rem*, the second with proprietary rights *in personam*, and the third with personal or non-proprietary rights, whether *in rem* or *in personam*. In this chapter we shall consider in outline the first of these branches, and we shall then proceed to deal in the same manner with the law of obligations. The law of status, on the other hand, is not of such a nature as to require or repay any further consideration from the point of view of general theory.

The term property, which we here use as meaning proprietary rights *in rem*, possesses a singular variety of different applications having different degrees of generality. These are the following:—

1. *All legal rights*. In its widest sense, property includes all a person's legal rights, of whatever description. A man's property is all that is *his in law*. This usage, however, is obsolete at the present day, though it is common enough in the older books. Thus Blackstone speaks of the property (*i.e.* right) which a master has in the person of his servant, and a father in the person of his child. "The inferior," he says (*b*) "hath no kind of property in the company, care, or assistance

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(*a*) Substantive law, as opposed to the law of procedure; civil law, as opposed to criminal.

(*b*) Blackstone, III. 143. "The child hath no property in his father or guardian as they have in him." *Ibid.*

of the superior, as the superior is held to have in those of the inferior." So Hobbes says (*c*): "Of things held in propriety, those that are dearest to a man are his own life and limbs; and in the next degree, in most men, those that concern conjugal affection; and after them riches and means of living." In like manner Locke (*d*) tells us that "every man has a property in his own person," and he speaks elsewhere (*e*) of a man's right to preserve "his property, that is, his life, liberty, and estate."

2. *Proprietary rights* (*dominium and status*). In a second and narrower sense, property includes not all a person's rights but only his proprietary as opposed to his personal rights. The former constitute his estate or property, while the latter constitute his status or personal condition. In this sense a man's land, chattels, shares, and the debts due to him are his property; but not his life or liberty or reputation. In this sense we may oppose to Locke's statement, that a man has a property in his own person, the saying of Ulpian: *Dominus membrorum suorum nemo videtur* (*f*). This is probably the most frequent application of the term at the present day, but in the case of a word having so many recognised varieties of usage it is idle to attempt to single out any one of them as exclusively correct. They are all of equal authenticity.

3. *Proprietary rights in rem* (*dominium and obligatio*). In a third application, which is that adopted in this chapter, the term includes not even all proprietary rights, but only those which are both proprietary and real. The law of property is the law of proprietary rights *in rem*, the law of proprietary rights *in personam* being distinguished from it as the law of obligations. According to this usage a freehold or leasehold estate in land, or a patent or copyright, is property; but a debt or the benefit of a contract is not.

4. *Corporeal property* (*dominium corporis and dominium juris*). Finally, in the narrowest use of the term, it includes nothing more than corporeal property—that is to say, the right of ownership in a material object, or that object itself

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(*c*) Leviathan, ch. xxx.; Eng. Wks. III. 329.
(*d*) Treatise on Civil Government, II. ch. v. sect. 27.
(*e*) *Ibid.* ch. vii. sect. 87.
(*f*) D. 9. 2. 13. pr.

identified with the right by way of metonymy. Thus property is defined by Ahrens (*g*) as "a material object subject to the immediate power of a person," and Bentham (*h*) considers as metaphorical and improper the extension of the term to include other rights than those which relate to material things.

§ 153. Kinds of Property.

All property is, as we have already seen (*i*), either corporeal or incorporeal. Corporeal property is the right of ownership in material things; incorporeal property is any other proprietary right *in rem*. Incorporeal property is itself of two kinds, namely (1) *jura in re aliena* or encumbrances, whether over material or immaterial things (for example, leases, mortgages, and servitudes), and (2) *jura in re propria* over immaterial things (for example, patents, copyrights, and trade-marks). The resulting threefold division of property appears in the following Table:—

Property	*Jura in re propria*	Material things	Land	Corporeal property.
			Chattels	
		Immaterial things	Patents	Incorporeal property.
			Copyrights	
			Trade-marks	
			&c.	
	Jura in re aliena	Leases		
		Servitudes		
		Securities		
		&c.		

(*g*) Droit Naturel, II. sect. 55.

(*h*) Principles, p. 231; Works, I. 108. So Puchta, sect. 231: Nur an . . . körperlichen Gegenständen ist Eigenthum möglich.

(*i*) *Supra*, § 87.

§ 154. The Ownership of Material Things.

The owner of a material object is he who owns a right to the aggregate of its uses. He who has merely a special and definitely limited right to the use of it, such as a right of way or other servitude, is not an owner of the thing but merely an encumbrancer of it. The definition, however, must not be misunderstood. Ownership is the right of *general* use, not that of absolute or unlimited use. He is the owner of a thing who is entitled to all those uses of it which are not specially excepted and cut off by the law. No such right as that of absolute and unlimited use is known to the law. All lawful use is either general (that is to say, residuary) or specific, the former being ownership, and the latter encumbrance.

The limits thus imposed upon an owner's right of use are of two kinds. The first constitute the *natural* limits of ownership. They are the various applications of the maxim: *Sic utere tuo ut alienum non laedas*—a legal principle whose function it is to restrain within due bounds the opposing maxim that a man may do as he pleases with his own. In the interests of the public or of a man's neighbours many uses of the things which are his are wholly excluded from his right of ownership.

The second class of restrictions upon an owner's right of use consists of those which flow from the existence of encumbrances vested in other persons. These are artificial limits which may or may not exist. My land may be mortgaged, leased, charged, bound by restrictive covenants, and so on, yet I remain the owner of it none the less. For I am still entitled to the residue of its uses, and whatever right over it is not specifically vested in some one else is vested in me. The residuary use so left to me may be of very small dimensions; some encumbrancer may own rights over it much more valuable than mine; but the ownership of it is in me and not in him. Were his right to determine to-morrow in any manner, my own, relieved from the encumbrance which now weighs it down, would forthwith spring up to its full stature and have again its full effect. No right loses its identity because of an encumbrance vested in some one else. That which is a right of ownership when there are no encumbrances, remains a right of ownership notwithstanding any number of them.

Inasmuch as the right of ownership is a right to the aggregate of the uses of the thing, it follows that ownership is necessarily permanent. No person having merely a temporary right to the use of a thing can be the owner of the thing, however general that right may be while it lasts. He who comes after him is the owner; for it is to him that the residue of the uses of the thing pertains. It is to be understood, however, that by a permanent right is meant nothing more than a right which is capable of lasting as long as the thing itself which is its subject-matter, however long or short that duration may be.

Even as the generality of ownership involves its permanence, so its permanence involves the further essential feature of inheritance. The only permanent rights which can be owned by a mortal man are those which can be handed down by him to his successors or representatives on his death. All others are temporary, their duration being necessarily limited to the lifetime of him in whom they are vested. The right of ownership, therefore, is essentially an inheritable right. It is capable of surviving its owner for the time being. It belongs to the class of rights which are divested by death but are not extinguished by it.

Summing up the conclusions to which we have attained, we may define the right of ownership in a material thing as the general, permanent, and inheritable right to the uses of that thing (*k*).

According to the rigour of traditional English legal doctrine there can be no owner of *land* except the Crown itself. The fee simple of land—the greatest right in it which a subject can possess—is not in truth ownership, but a mere encumbrance upon the ownership of the

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(*k*) The full power of alienation and disposition is an almost invariable element in the right of ownership, but cannot be regarded as essential, or included in the definition of it. A married woman subject to a restraint on anticipation is none the less the owner of her property, though she cannot alienate or encumber it.

Austin (p. 817, 3rd ed.) defines the right of ownership as a "right indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration, over a determinate thing."

Crown. It is a tenancy or lease granted to a man and his heirs. It is a temporary not a permanent right of user. It will come to its natural termination on the death of the tenant without leaving an heir or devisee in whom the right may be continued. The land will thereupon revert to the Crown, that is to say, the Crown's ownership, which has never been divested, but has merely been encumbered by the fee simple, will through the destruction of this encumbrance become once more free and absolute. In the case of chattels it is otherwise. They can be owned by the subject no less than by the Crown. It is true that if the owner of them dies intestate without kin, they will go to the Crown as *bona vacantia*, just as land will go to the Crown as what used to be termed an escheat. But between these two processes there is a profound difference in legal theory. In the case of chattels the Crown succeeds to the right which was vested in the dead man; his ownership is continued in the Crown, just as it would have been continued in his next of kin had there been any. But in the case of land, as already said, the right of the dead man has come to an end, and the Crown succeeds to no right of his, but simply comes into its own again.

This distinction, however, between the fee simple of land and the ownership of it is a matter of form rather than of substance. In fact, if not in legal theory, the right of a tenant in fee simple is permanent; for land reverts to the Crown only on an intestacy, and therefore can be prevented from doing so by the act of the tenant. We are at liberty, therefore, to disregard this technicality of real property law, and to speak of the fee simple of land as the ownership of it, the right of the Crown being viewed, accordingly, not as vested and continuing ownership subject to an encumbrance, but as a contingent right of succession to an intestate owner.

§ 155. Movable and Immovable Property.

Among material things the most important distinction is that between movables and immovables, or, to use terms more familiar in English law, between chattels and land. In all legal systems these two classes of objects are to some extent governed by different rules, though in no system has the difference been so great as until recently it has in our own.

Considered in its legal aspect, an immovable, that is to say, a piece of land, includes the following elements:—

1. A determinate portion of the earth's surface.

2. The ground beneath the surface down to the centre of the world. All the pieces of land in England meet together in one terminal point at the earth's centre.

3. Possibly the column of space above the surface *ad infinitum*. "The earth," says Coke (*l*), "hath in law a great extent upwards, not only of water as hath been said, but of ayre and all other things even up to heaven; for *Cujus est solum, ejus est usque ad coelum*." The authenticity of this doctrine, however, is not wholly beyond dispute. It would prohibit as an actionable trespass all use of the air-space above the appropriated surface of the earth, at whatever height this use took place, and however little it could affect the interests of the landowner. It may be that the law recognises no right of ownership in the air-space at all, or at least no right of exclusive use, but merely prohibits all acts which by their nature or their proximity interfere with the full enjoyment and use of the surface (*m*). By the German Civil Code (*n*), the owner of land owns the space above it, but has no right to prohibit acts so remote from the surface that they in no way affect his interests. In England it is now expressly provided by statute (The Air Navigation Act, 1920) that the flight of aircraft at a reasonable height above the ground is not actionable at the suit of the owner or occupier of the land below.

4. All objects which are on or under the surface in its natural state; for example, minerals and natural vegetation. All these are part of the land, even though they are in no way physically attached to it. Stones lying loose upon the surface are in the same category as the stone in a quarry.

5. Lastly, all objects placed by human agency on or under the surface, with the intention of permanent annexation. These become part of the land, and lose their identity as separate movables or chattels; for example, buildings, walls, and fences. *Omne quod inaedificatur solo cedit*, said the Roman law (*o*). Provided that the requisite intent of permanent annexation is present, no physical attachment to the surface is required. A wall built of stones without mortar

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(*l*) Co. Litt. 4 a.

(*m*) On this question see *Pickering* v. *Rudd*, 4 Camp. 219; *Fay* v. *Prentice*, 1 C. B. 828; *Wandsworth Board of Works* v. *United Telegraph Coy.*, 13 Q. B. D. 904; *Ellis* v. *Loftus Iron Coy.*, L. R. 10 C. P. 10.

(*n*) Art. 905.

(*o*) Inst. Just. 2. 1. 29. See also Gaius, 2. 73: Superficies solo cedit.

or foundations is part of the land on which it stands (*p*). Conversely, physical attachment, without the intent of permanent annexation, is not in itself enough. Carpets, tapestries, or ornaments nailed to the floor or walls of a house are not thereby made part of the house. Money buried in the ground is as much a chattel (*q*) as money in its owner's pocket (*r*).

It is clear that the distinction between movables and immovables is in truth and in fact applicable to material objects only. Yet the law has made an unfortunate attempt to apply it to *rights* also. Rights no less than things are conceived by the law as having a local situation, and as being either movable or permanently fixed in a definite locality. The origin of this illogical conception is to be found in the identification of rights of ownership with the material things which are the objects of them. I am said to own land and chattels, as well as easements, shares, debts, contracts, and patents. All these things are equally property, and since some of them have a local situation and can be truly classed as movable or immovable, the law has been led by inadvertence to attribute these qualities to all of them. It has recognised in things which are incorporeal certain attributes which in truth pertain to things corporeal only. It has divided the whole sphere of proprietary rights by reference to a distinction which is truly applicable not to rights at all, but to physical objects. Nor is this merely a peculiarity of English law, for it is found in Continental systems also (*s*).

(*p*) *Monti* v. *Barnes*, (1901) 1 K. B. 205.

(*q*) Similar law is contained in Article 95 of the German Civil Code: "Things are not part of the land, which are attached to it simply for a temporary purpose." It is only by slow degrees and with imperfect consistency that our law has worked out any intelligible principle on this difficult matter; and although the rule as stated in the text may be accepted as the main guiding principle, it cannot be said even yet that English law has succeeded in establishing any uniform doctrine applicable to all cases.

(*r*) Unlike a chattel, a piece of land has no natural boundaries. Its separation from the adjoining land is purely arbitrary and artificial, and it is capable of subdivision and separate ownership to any extent that may be desired. The lines of subdivision are usually vertical, but may be horizontal. The surface of land, for example, may belong to one man and the substrata to another. Each story of a house may have a different owner. In *The Midland Railway Coy.* v. *Wright*, (1901) 1 Ch. 738, it was held that a right had been acquired by prescription to the surface of land belonging to a railway company, although a tunnel beneath the surface remained the property of the company as having been continuously in its occupation.

(*s*) Baudry-Lacantinerie, Des Biens, sect. 123 "We know that rights, regarded as incorporeal things, are properly speaking neither movables nor immovables. But by a fiction the law classes them as one or the other according to the nature of their subject-matter." See also Dernburg's Pandekten, I. sect. 74.

On what principle, then, does the law determine whether a right is to be classed as immovable or as movable? The general rule is that a right has in this respect the same quality as its subject-matter. All rights over immovable things, whether rights *in re propria* or rights *in re aliena*, are themselves to be classed as immovable property; unless, indeed, as in the case of mortgages, they are merely accessory to debts or other *bona mobilia*, in which case they may partake, for some purposes at least, of the quality of the thing to which they are appurtenant. Similarly all rights over movables are *bona mobilia* themselves. So far there is no difficulty. What shall we say, however, of those rights which have no material objects at all, such as a copyright, a patent, the good-will of a business, a trade-mark, or the benefit of a contract? The answer is that all such rights are classed by the law as movable. For the class of movable property is residuary, and includes all rights which can make good no claim to be classed as immovable.

The law not merely classifies rights as movable and immovable, but goes further in the same direction, and attributes local situation to them. It undertakes to say not merely *whether* a right exists, but *where* it exists. Nor is this a difficult task in the case of those rights which have determinate material things as their objects. A servitude or other *jus in re aliena* over a piece of land is situated in law where the land is situated in fact. A right over a chattel is movable property, and where the chattel goes the right goes also. But where there is no material object at all, what are we to say as to the local situation of the right? Where is a debt situated, or a share in a company, or the benefit of a contract, or a copyright? Such questions can be determined only by more or less arbitrary rules based upon analogy, and it is to be regretted that it has been thought needful to ask and answer them at all. As the law stands, however, it contains several rules based on the assumption that all property which exists must exist *somewhere* (*t*), and for the application of these rules the determination of the local situation of rights is necessary, even though it leads into the region of legal fictions. "The legal conception of property," says Lord Lindley (*u*), "appears to me to involve the legal conception of existence somewhere. . . . To talk of property as existing nowhere is to use language which to me is unintelligible."

The leading principle as to the local situation of rights is that they are situated where they are exercised and enjoyed. Rights over

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(*t*) For example, the jurisdiction of English courts in the administration of deceased persons' estates depends on the deceased having left property in England. Portions of revenue law and of private international law are also based on the assumption that all proprietary rights possess a local situation.

(*u*) *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Limited*, (1901) A. C. at p. 236.

material things, therefore, have the same situation as those things themselves. The good-will of a business is situated in the place where the business is carried on (*x*). Debts are in general situated in the place where the debtor resides (*y*), since it is there that the creditor must go to get his money (*z*).

§ 156. Real and Personal Property.

Derived from and closely connected with the distinction between immovable and movable property is that between real and personal property. These are two cross divisions of the whole sphere of proprietary rights. Real property and immovable property form intersecting circles which are very nearly though not quite coincident. The law of real property is almost equivalent to the law of land, while the law of personal property is all but identical with the law of movables. The partial failure of coincidence is due not to any logical distinction, but to the accidental course of legal development; and to this extent the distinction between real and personal property is purely arbitrary and possesses no scientific basis. Real property comprises all rights over land, with such additions and exceptions as the law has seen fit to establish. All other proprietary rights, whether *in rem* or *in personam*, pertain to the law of personal property.

The distinction between real and personal property has no logical connexion with that between real and personal rights. There is, how-

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(*x*) *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Limited*, (1901) A. C. at p. 236.

(*y*) Dicey, Conflict of Laws, p. 343, 3rd ed.

(*z*) There are certain cases, however, which have been decided on the assumption that incorporeal property possesses no local situation at all. For this reason it was held in *The Smelting Company of Australia* v. *Commissioners of Inland Revenue*, (1897) 1 Q. B. 172, that a share of a New South Wales patent, together with the exclusive right of using it within a certain district of that colony, was not property "locally situated out of the United Kingdom" within the meaning of sect. 59, sub-sect. 1, of the Stamp Act, 1891. "I do not see," says Lopes, L.J., at p. 181, "how a share in a patent, or a licence to use a patent, which is not a visible or tangible thing, can be said to be locally situate anywhere." See, however, as to this case, the observations of Vaughan Williams, L.J., in *Muller & Co.'s Margarine, Limited* v. *Inland Revenue Commissioners*, (1900) 1 Q. B. at p. 322, and of Lord Lindley on appeal in the House of Lords, (1901) A. C. at p. 237. See further, as to the local situation of incorporeal property, *Danubian Sugar Factories* v. *Commissioners of Inland Revenue*, (1901), 1 K. B. 545; *Commissioner of Stamps* v. *Hope*, (1891) A. C. 476; *Att.-Gen.* v. *Dimond*, 1 C. & J. 356; *In re Clark*, (1904) 1 Ch. 294.

ever, an historical relation between them, inasmuch as they are both derived from the same source, namely the Roman distinction between actions *in rem* and actions *in personam*. Real property meant originally that which was recoverable in a real action, while personal property was that which was recoverable in a personal action, and this English distinction between real and personal actions was derived by Bracton and the other founders of our law from the *actiones in rem* and *in personam* of Justinian, though not without important modifications of the Roman doctrine (*a*).

In connexion with the distinctions between movable and immovable, and between real and personal property, we must notice the legal significance of the term chattel. This word has apparently three different meanings in English law:—

1. A movable physical object; for example, a horse, a book, or a shilling, as contrasted with a piece of land.

2. Movable property, whether corporeal or incorporeal; that is to say, chattels in the first sense together with all proprietary rights except those which are classed as immovable. In this usage debts, shares, contracts, and other choses in action are chattels, no less than furniture or stock in trade. So also are patents, copyrights, and other rights *in rem* which are not rights over land. This double use of the word chattel to indicate both material things and rights is simply an application, within the sphere of movable property, of the metonymy which is the source of the distinction between corporeal and incorporeal property.

3. Personal property, whether movable or immovable, as opposed to real property. In this sense leaseholds are classed as chattels, because of the special rule by which they are excluded from the domain of real property.

§ 157. Rights in re propria in Immaterial Things.

The subject-matter of a right of property is either a material or an immaterial thing. A material thing is a physical object; an immaterial thing is anything else which may be the subject-matter of a right (*b*). It is to things of the former class that

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(*a*) The matter has been well discussed by Mr. T. C. Williams in L. Q. R. IV. 394.

(*b*) Under the head of material things we must class the *qualities* of matter, so far as they are capable in law of being in themselves the objects of rights. The qualities which thus admit of separate legal appropriation are two in number, namely force and space. Electricity is in law a chattel, which can be owned, sold, stolen, and otherwise rightfully and wrongfully dealt with. 45 & 46 Vict. c. 56, s. 23. Definite portions of empty space are capable of appropriation and ownership, no less than the material objects with which other portions of space are filled. The interior the law of property almost wholly relates. In the great majority of cases a right of property is a right to the uses of a material object. It is the chief purpose of this department of the law to allot to every man his portion in the material instruments of human well-being—to divide the earth and the fulness of it among the men who live in it. The only immaterial things which are recognised by law as the subject-matter of rights of this description are the various *immaterial products of human skill and labour*. Speaking generally we may say that in modern law every man owns that which he creates. That which he produces is his, and he has an exclusive right to the use and benefit of it. The immaterial product of a man's brains may be as valuable as his land or his goods. The law, therefore, gives him a proprietary right in it, and the unauthorised use of it by other persons is a violation of his ownership, no less than theft or trespass is. These immaterial forms of property are of five kinds (c):—

1. *Patents*. The subject-matter of a patent-right is an invention. He whose skill or labour produces the idea of a new process, instrument, or manufacture, has that idea as his own in law. He alone is entitled to use it and to draw from it the profit inherent in it.

2. *Literary copyright*. The subject-matter of this right is the literary expression of facts or thoughts. He to whose skill or labour this expression is due has in it a proprietary right of exclusive use.

3. *Artistic copyright*. Artistic design in all its various forms, such as drawing, painting, sculpture, and photography, is the subject-matter of a right of exclusive use analogous to

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of my house is as much mine as are the walls and the roof. It is commonly said that the owner of land owns also the space above the surface *usque ad coelum*. Whether this is truly so is a doubtful point as the law stands, but there is no theoretical difficulty in allowing the validity of such a claim to the ownership of empty space.

(c) The distinction formerly noticed by us (§ 88) between *corporeal* and *incorporeal* things must not be confounded with the present distinction between *material* and *immaterial* things. The latter is a logical distinction, but the former is a mere artifice of speech. An incorporeal thing is a kind of right, namely any right which is not identified with some material thing which is its subject-matter. An immaterial thing is not a right but the subject-matter of one. It is any subject-matter of a right except a material object.

literary copyright. The creations of an artist's skill or of a photographer's labour are his exclusive property. The object of this right is not the material thing produced, but the *form* impressed upon it by the maker. The picture, in the concrete sense of the material paint and canvas, belongs to him who purchases it; but the picture, in the abstract sense of the artistic form made visible by that paint and canvas, belongs to him who made it. The former is material property, the latter is immaterial. The right in each case is one of exclusive use. The right to the material picture is infringed by destroying it or taking it away. The right to the immaterial picture is infringed by making material pictures which embody it.

4. *Musical and dramatic copyright.* A fourth class of immaterial things consists of musical and dramatic works. The immaterial product of the skill of the musician or the playwright is the subject-matter of a proprietary right of exclusive use which is infringed by any unauthorised performance or representation.

5. *Commercial good-will; trade-marks and trade-names.* The fifth and last species of immaterial things includes commercial good-will and the special forms of it known as trade-marks and trade-names. He who by his skill and labour establishes a business acquires thereby an interest in the good-will of it, that is to say, in the established disposition of customers to resort to him. To this good-will he has an exclusive right which is violated by any one who seeks to make use of it for his own advantage, as by falsely representing to the public that he is himself carrying on the business in question. Special forms of this right of commercial good-will are rights to trade-names and trade-marks. Every man has an exclusive right to the name under which he carries on business or sells his goods—to this extent at least that no one is at liberty to use that name for the purpose of deceiving the public and so injuring the owner of it. He has a similar right to the exclusive use of the marks which he impresses upon his goods, and by which they are known and identified in the market as his.

§ 158. Leases.

Having now considered the different kinds of rights *in re propria* which fall within the law of property, we proceed to deal with the various rights *in re aliena* to which they may be subject. As already stated (*d*), the chief of these are four in number, namely Leases, Servitudes, Securities, and Trusts. The nature of a trust has been sufficiently examined in another connexion (*e*), and it is necessary here to consider the other three only (*f*). And first of leases or tenancies.

Although a lease of land and a bailment of chattels are transactions of essentially the same nature, there is no term which, in its recognised use, is sufficiently wide to include both. The term bailment is never applied to the tenancy of land, and although the term lease is not wholly inapplicable in the case of chattels, its use in this connexion is subject to arbitrary limitations. It is necessary, therefore, in the interests of orderly classification, to do some violence to received usage, in adopting the term lease as a generic expression to include not merely the tenancy of land, but all kinds of bailments of chattels, and all encumbrances of incorporeal property which possess the same essential nature as a tenancy of land.

A lease, in this generic sense, is that form of encumbrance which consists in a right to the possession and use of property owned by some other person. It is the outcome of the technical separation of ownership and rightful possession. We have seen that possession is the continuing exercise of a right, and that although a right is normally exercised by the owner of it, it may in special cases be exercised by some one else. This separation of ownership and possession may be either rightful

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(*d*) *Supra*, § 83.

(*e*) *Supra*, § 90.

(*f*) Encumbrances are not confined to the law of property, but pertain to the law of obligations also. Choses in action may be mortgaged, settled in trust, or otherwise made the subject-matter of *jura in re aliena*, no less than land and chattels. Much, therefore, of what is to be said here touching the nature of the different forms of encumbrance is equally applicable to the law of rights *in personam*.

or wrongful, and if rightful it is an encumbrance of the owner's title (g).

The right which is thus encumbered by a lease is usually the ownership of a material object, and more particularly the ownership of land. Here as elsewhere the material object is identified in speech with the right itself. We say that the *land* is leased, just as we say that the land is owned or possessed. The lessee of land is he who rightfully possesses it, but does not own it. The lessor of land is he who owns it, but who has transferred the possession of it to another. Encumbrance by way of lease is not confined, however, to the right of ownership of a material object. All rights may be leased which can be possessed, that is to say, which admit of continuing exercise; and no rights can be leased which cannot be possessed, that is to say, which are extinguished by their exercise. A servitude appurtenant to land, such as a right of way, is leased along with the land itself. The owner of a lease may encumber it with a sub-lease. The owner of a patent or copyright may grant a lease of it for a term of years, entitling the lessee to the exercise and use of the right but not to the ownership of it. Even obligations may be encumbered in the same fashion, provided that they admit of continuing or repeated exercise; for example, annuities, shares, money in the public funds, or interest-bearing debts. All these may be rightfully possessed without being owned, and owned without being possessed, as when they are settled in trust for a tenant for life with remainder to some one else.

Is it essential that a lease should be of less duration than the right which is subject to it? This is almost invariably the case; land is leased for a term of years or for life, but not in perpetuity; the owner of a thing owns it for ever, but the lessee of it possesses it for a time. We may be tempted, therefore, to regard this difference of duration as essential, and to define a lease as a right to the temporary exercise of a right vested in some one else. But this is not so. There is no objection in principle to a lease of land in perpetuity, or to a lease of a patent or copyright for the full term of its existence. It may be objected that a lease of this description would not be a true lease or encumbrance at all, but an assignment of the right itself; that the grantee would become the owner of the right, and not a mere encumbrancer; and in favour of this contention it may be pointed out that a sub-lease for the whole term is construed in English law as an assignment of the term, a sub-lease being necessarily shorter than the term, if only by a single day (*h*).

(g) Possession by way of *security* only, *e.g.*, a pledge, is differentiated by its purpose, however, and falls within the class of securities, not within that of leases.

Whatever the actual rule of English law may be, however, there is nothing in legal theory to justify us in asserting that any such difference of duration is essential to the existence of a true lease. A lease exists whenever the rightful possession of a thing is separated from the ownership of it; and although this separation is usually temporary, there is no difficulty in supposing it permanent. I may own a permanent right to exercise another right without owning the latter right itself. The ownership may remain dormant, deprived of any right of exercise and enjoyment, in the hands of the lessor. I am not necessarily the owner of a patent, because I have acquired by contract with the owner a right to the exclusive use of it during the whole term of its duration. So far as legal principle is concerned, I may still remain the owner of a lease, although I may have granted a sub-lease to another for the whole residue of the term. To assign a lease and to sub-let it for the whole term are in the intention of the parties and in legal theory two entirely different transactions. The assignment is a substitution of one tenant for another, the assignor retaining no rights whatever. The sub-lease, on the contrary, is designed to leave the original relation of landlord and tenant untouched, the sub-lessee being the tenant of the lessee and not of the original lessor (*i*).

§ 159. Servitudes.

A servitude is that form of encumbrance which consists in a right to the limited use of a piece of land without the possession of it; for example, a right of way over it, a right to the passage of light across it to the windows of a house on the adjoining land, a right to depasture cattle upon it, or a right to derive support from it for the foundations of an adjoining building (*k*).

(*h*) *Beardman* v. *Wilson*, L. R. 4 C. P. 57.

(*i*) An example of a lease in perpetuity is the emphyteusis of Roman law. In consequence of its perpetuity the Roman lawyers were divided in opinion as to the true position of the tenant or *emphyteuta*, some regarding him as an owner and others as an encumbrancer. The law was finally settled in the latter sense. Just. Inst. III. 24. 3.

(*k*) The term servitude (*servitus*) is derived from Roman law, and has scarcely succeeded in obtaining recognition as a technical term of English

It is an essential characteristic of a servitude that it does not involve the possession of the land over which it exists. This is the difference between a servitude and a lease. A lease of land is the rightful possession and use without the ownership of it, while a servitude over land is the rightful use without either the ownership or the possession of it. There are two distinct methods in which I may acquire a road across another man's property. I may agree with him for the exclusive possession of a defined strip of the land; or I may agree with him for the use of such a strip for the sole purpose of passage, without any exclusive possession or occupation of it. In the first case I acquire a lease; in the second a servitude (*l*).

Servitudes are of two kinds, which may be distinguished as private and public. A private servitude is one vested in a determinate individual; for example, a right of way, of light, or of support, vested in the owner of one piece of land over an adjoining piece or a right granted to one person of fishing in the water of another, or of mining in another's land. A public servitude is one vested in the public at large or in some class of indeterminate individuals; for example, the right of the public to a highway over land in private ownership, the right of the public to navigate a river of which the bed belongs to some private person, the right of the inhabitants of a parish to use a certain piece of private ground for the purposes of recreation.

Servitudes are further distinguishable in the language of English law as being either appurtenant or in gross. A servitude appurtenant is one which is not merely an encumbrance of one piece of land, but is also accessory to another piece. It is a right of using one piece for the benefit of another; as in the case of a right of way from A.'s house to the high road across B.'s field, or a right of support for a building, or a right

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law. It is better, however, than the English *easement*, inasmuch as easements are in the strict sense only one class of servitudes as above defined.

(*l*) It is only over land that servitudes can exist. Land is of such a nature as to admit readily of non-possessory uses, whereas the use of a chattel usually involves the possession of it for the time being, however brief that time may be. The non-possessory use of chattels, even when it exists, is not recognised by the law as an encumbrance of the ownership, so as to run with it into the hands of assignees.

to the access of light to a window. The land which is burdened with such a servitude is called the servient land or tenement; that which has the benefit of it is called the dominant land or tenement. The servitude runs with each of the tenements into the hands of successive owners and occupiers. Both the benefit and the burden of it are concurrent with the ownership of the lands concerned. A servitude is said to be in gross, on the other hand, when it is not so attached and accessory to any dominant tenement for whose benefit it exists. An example is a public right of way or of navigation or of recreation, or a private right of fishing, pasturage, or mining (*m*).

§ 160. Securities.

A security is an encumbrance, the purpose of which is to ensure or facilitate the fulfilment or enjoyment of some other right (usually though not necessarily a debt) vested in the same person (*n*). Such securities are of two kinds, which may be distinguished as mortgages and liens, if we use the latter term in its widest permissible sense (*o*). In considering the nature of this distinction we must first notice a plausible but erroneous explanation. A mortgage, it is sometimes said, is a security created by the *transfer* of the debtor's property to the creditor, while a lien is merely an encumbrance of some

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(*m*) An *easement*, in the strictest sense, means a particular kind of servitude, namely a private and appurtenant servitude which is not a right to take any *profit* from the servient land. A right of way or of light or of support is an easement; but a right to pasture cattle or to dig for minerals is in English law a distinct form of servitude known as a profit. This distinction is unknown in other systems, and it has no significance in juridical theory. Its practical importance lies in the rule that an easement must (it seems) be appurtenant, while a profit may be either appurtenant or in gross.

(*n*) The term security is also used in a wider sense to include not only securities over property, but also the contract of suretyship or guarantee —a mode of ensuring the payment of a debt by the addition of a second and accessory debtor, from whom payment may be obtained on default of the principal debtor. With this form of security we are not here concerned, since it pertains not to the law of property, but to that of obligations.

(*o*) The word lien has not succeeded in attaining any fixed application as a technical term of English law. Its use is capricious and uncertain, and we are at liberty, therefore, to appropriate it for the purpose mentioned in the text, *i.e.*, to include all forms of security except mortgages.

sort created in favour of the creditor over property which remains vested in the debtor; a mortgagee is the owner of the property, while a pledgee or other lienee is merely an encumbrancer of it. This, however, is not a strictly accurate account of the matter, though it is true in the great majority of cases. A mortgage may be created by way of encumbrance, no less than by way of transfer (*p*); and a mortgagee does not necessarily become the owner of the property mortgaged. A lease, for example, is commonly mortgaged, not by the assignment of it, but by the grant of a sub-lease to the creditor, so that the mortgagee becomes not the owner of the lease but an encumbrancer of it. Similarly, freehold land may be mortgaged by the grant to the mortgagee of a long term of years.

Inasmuch, therefore, as a mortgage is not necessarily the transfer of the property to the creditor, what is its essential characteristic? The question is one of considerable difficulty, but the true solution is apparently this. A lien is a right which is *in its own nature* a security for a debt and nothing more; for example, a right to retain possession of a chattel until payment, a right to distrain for rent, or a right to receive payment out of a certain fund. A mortgage, on the contrary, is a right which is in its own nature an independent or principal right, and not a mere security for another right, but which is artificially cut down and limited, so that it may serve in the particular case as a security and nothing more; for example, the fee simple of land, a lease of land for a term of years, or the ownership of a chattel. The right of the lienee is vested in him *absolutely*, and not merely by way of security; for it is itself nothing more than a security. The right of a mortgagee, on the contrary, is vested in him conditionally and *by way of security only*, for it is in itself something more than a mere security. A lien cannot survive the debt secured; it ceases and determines *ipso jure* on the extinction of the debt. It is merely the shadow, so to speak, cast by the debt upon the property of the debtor. But the right vested in a mortgagee has an independent existence. It will, or may, remain out-

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(*p*) As we shall see, a mortgage by way of transfer is none the less an encumbrance also—an encumbrance, that is to say, of the beneficial ownership which remains vested in the mortgagor.

standing in the mortgagee even after the extinction of the debt. When thus left outstanding, it must be re-transferred or surrendered to the mortgagor, and the right of the mortgagor to this re-assignment or surrender is called his right or equity of redemption. The existence of such an equity of redemption is therefore the test of a mortgage. In liens there is no such right, for there is nothing to redeem. The creditor owns no right which he can be bound to give back or surrender to his debtor. For his right of security has come to its natural and necessary termination with the termination of the right secured (*q*).

Mortgages are created either by the transfer of the debtor's right to the creditor, or by the encumbrance of it in his favour. The first of these methods is by far the more usual and important. Moreover it is peculiar to mortgages, for liens can be created only by way of encumbrance. Whenever a debtor *transfers* his right to the creditor by way of security, the result is necessarily a mortgage; for there can be no connexion between the duration of the debt so secured and the natural duration of the right so transferred. The right transferred may survive the debt, and the debtor therefore retains the right of redemption which is the infallible test of a mortgage. When on the other hand a debtor *encumbers* his right in favour of the creditor, the security so created is either a mortgage or a lien according to circumstances. It is a mortgage, if the encumbrance so created is independent of the debt secured in respect of its natural duration; for example, a term of years or a permanent servitude. It is a lien, if the encumbrance is in respect of its natural duration dependent on, and coincident with the debt secured; for example, a pledge, a vendor's lien, a landlord's right of distress, or an equitable charge on a fund.

(*q*) It is not essential to a mortgage that the right vested in the mortgagee should in actual fact survive the right secured by it, so as to remain outstanding and redeemable. It is sufficient that in its nature it should be capable of doing so, and therefore requires to be artificially restricted by an obligation or condition of re-assignment or surrender. This re-assignment or surrender may be effected by act of the law, no less than by the act of the mortgagee. The conveyance of the fee simple of land by way of security is necessarily a mortgage and not a lien, whether it revests in the mortgagor *ipso jure* on the payment of the debt, or does not revest until the mortgagee has executed a deed of reconveyance.

Speaking generally, any alienable and valuable right whatever may be the subject-matter of a mortgage. Whatever can be transferred can be transferred by way of mortgage; whatever can be encumbered can be encumbered by way of mortgage. Whether I own land, or chattels, or debts, or shares, or patents, or copyrights, or leases, or servitudes, or equitable interests in trust funds, or the benefit of a contract, I may so deal with them as to constitute a valid mortgage security. Even a mortgage itself may be transferred by the mortgagee to some creditor of his own by way of mortgage, such a mortgage of a mortgage being known as a sub-mortgage.

In a mortgage by way of transfer the debtor, though he assigns the property to his creditor, remains none the less the beneficial or equitable owner of it himself. A mortgagor, by virtue of his equity of redemption, has more than a mere personal right against the mortgagee to the re-conveyance of the property; he is already the beneficial owner of it. This double ownership of mortgaged property is merely a special form of trust. The mortgagee holds in trust for the mortgagor, and has himself no beneficial interest, save so far as is required for the purposes of an effective security. On the payment or extinction of the debt the mortgagee becomes a mere trustee and nothing more; the ownership remains vested in him, but is now bare of any vestige of beneficial interest. A mortgage, therefore has a double aspect and nature. Viewed in respect of the *nudum dominium* vested in the mortgagee, it is a transfer of the property; viewed in respect of the beneficial ownership which remains vested in the mortgagor, it is merely an encumbrance of it.

The prominence of mortgage as the most important form of security is a peculiarity of English law. In Roman law, and in the modern Continental systems based upon it, the place assumed by mortgages in our system is taken by the lien (*hypotheca*) in its various forms. The Roman mortgage (*fiducia*) fell wholly out of use before the time of Justinian, having been displaced by the superior simplicity and convenience of the *hypotheca;* and in this respect modern Continental law has followed the Roman. There can be no doubt that a similar substitution of the lien for the mortgage would immensely simplify and improve the law of England. The complexity and difficulty of the English law of security—due entirely to the adoption of the system of mortgages—must be a source of amazement to a French or German lawyer. Whatever can be done by way of mortgage in securing a debt can be done equally well by way of lien, and the lien avoids all that extraordinary disturbance and complication of legal relations which is essentially involved in the mortgage. The best type of security is that which combines the most efficient protection of the creditor with the least interference with the rights of the debtor, and in this latter respect the mortgage falls far short of the ideal. The true form of security is a lien, leaving the full legal and equitable ownership in the debtor, but vesting in the creditor such rights and powers (as of sale, possession, and so forth) as are required, according to the nature of the subject-matter, to give the creditor sufficient protection, and lapsing *ipso jure* with the discharge of the debt secured (*r*).

Liens are of various kinds, none of which present any difficulty or require any special consideration.

1. *Possessory liens*—consisting in the right to retain possession of chattels or other property of the debtor. A power of sale may or may not be combined with this right of possession. Examples are pledges of chattels, and the liens of innkeepers, solicitors, and vendors of goods.

2. *Rights of distress or seizure*—consisting in the right to take possession of the property of the debtor, with or without a power of sale. Examples are the right of distress for rent, and the right of the occupier of land to distrain cattle trespassing on it.

3. *Powers of sale.* This is a form of security seldom found in isolation, for it is usually incidental to the right of possession conferred by one or other of the two preceding forms of lien. There is no reason, however, why it should not in itself form an effective security.

4. *Powers of forfeiture*—consisting in a power vested in the creditor of destroying in his own interest some adverse right vested in the

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(*r*) This is one of the reforms effected by the Torrens system of real property law in force in the Australasian colonies. The so-called mortgages of land under that system are in reality merely liens.

debtor. Examples are a landlord's right of re-entry upon his tenant, and a vendor's right of forfeiting the deposit paid by the purchaser.

5. *Charges*—consisting in the right of a creditor to receive payment out of some specific fund or out of the proceeds of the realisation of specific property. The fund or property is said to be charged with the debt which is thus payable out of it.

§ 161. Modes of Acquisition: Possession.

Having considered the various forms which proprietary rights *in rem* assume, we proceed to examine the modes of their acquisition. An attempt to give a complete list of these titles would here serve no useful purpose, and we shall confine our attention to four of them which are of primary importance. These are the following: Possession, Prescription, Agreement, and Inheritance.

The possession of a material object is a title to the ownership of it. The *de facto* relation between person and thing brings the *de jure* relation along with it. He who claims a chattel or a piece of land as his, and makes good his claim in *fact* by way of possession, makes it good in *law* also by way of ownership. There is, however, an important distinction to be drawn. For the thing so possessed may, or may not, already belong to some other person. If, when possession of it is taken by the claimant, it is as yet the property of no one —*res nullius* as the Romans said—the possessor acquires a title good against all the world. The fish of the sea and the fowls of the air belong by an absolute title to him who first succeeds in obtaining possession of them. This mode of acquisition is known in Roman law as *occupatio*.

On the other hand, the thing of which possession is taken may already be the property of some one else. In this case the title acquired by possession is good, indeed, against all third persons, but is of no validity at all against the true owner. Possession, even when consciously wrongful, is allowed as a title of right against all persons who cannot show a better, because a prior, title in themselves. Save with respect to the rights of the original proprietor, my rights to the watch in my pocket are much the same, whether I bought it honestly, or found it, or abstracted it from the pocket of some one else. If it is stolen from me, the law will help me to the recovery of it. I can effectually sell it, lend it, give it away, or bequeath it, and it will go on my death intestate to my next of kin. Whoever acquires it from me, however, acquires in general nothing save my limited and imperfect title to it, and holds it, as I do, subject to the superior claims of the original owner.

A thing owned by one man and thus adversely possessed by another has in a definite sense two owners. The ownership of the one is absolute and perfect, while that of the other is relative and imperfect, and is often called, by reason of its origin in possession, possessory ownership.

If a possessory owner is wrongfully deprived of the thing by a person other than the true owner, he can recover it. For the defendant cannot set up as a defence his own possessory title, since it is later than, and consequently inferior to, the possessory title of the plaintiff. Nor can he set up as a defence the title of the true owner—the *jus tertii*, as it is called; the plaintiff has a better, because an earlier, title than the defendant, and it is irrelevant that the title of some other person, not a party to the suit, is better still. The expediency of this doctrine of possessory ownership is clear. Were it not for such a rule, force and fraud would be left to determine all disputes as to possession, between persons of whom neither could show an unimpeachable title to the thing as the true owner of it (*s*).

§ 162. Prescription.

Prescription (*t*) may be defined as the effect of lapse of time in creating and destroying rights; it is the operation

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(*s*) Applications of the rule of possessory ownership may be seen in the cases of *Armory* v. *Delamirie*, 1 Str. 504; 1 Smith, L. C. 343; *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; and *Perry* v. *Clissold*, (1907) A. C. 73.

(*t*) The term prescription (*praescriptio*) has its origin in Roman law. It meant originally a particular part of the *formula* or written pleadings in a law suit—that portion, namely, which was written first (*praescriptum*) by way of a preliminary objection on the part of the defendant. *Praescriptio fori*, for example, meant a preliminary plea to the jurisdiction of the court. So *praescriptio longi temporis* was a plea that the claim of the plaintiff was barred by lapse of time. Hence, by way of abbreviation and metonymy (other forms of prescription being forgotten) prescription in the modern sense.

of time as a vestitive fact. It is of two kinds, namely (1) positive or acquisitive prescription and (2) negative or extinctive prescription. The former is the creation of a right, the latter is the destruction of one, by the lapse of time. An example of the former is the acquisition of a right of way by the *de facto* use of it for twenty years. An instance of the latter is the destruction of the right to sue for a debt after six years from the time at which it first became payable.

Lapse of time, therefore, has two opposite effects. In positive prescription it is a title of right, but in negative prescription it is a divestitive fact. Whether it shall operate in the one way or in the other depends on whether it is or is not accompanied by *possession*. Positive prescription is the investitive operation of lapse of time *with* possession, while negative prescription is the divestitive operation of lapse of time *without* possession. Long possession creates rights, and long want of possession destroys them. If I possess an easement for twenty years without owning it, I begin at the end of that period to own as well as to possess it. Conversely if I own land for twelve years without possessing it, I cease on the termination of that period either to own or to possess it. In both forms of prescription, fact and right, possession and ownership, tend to coincidence. *Ex facto oritur jus.* If the root of fact is destroyed, the right growing out of it withers and dies in course of time. If the fact is present, the right will in the fulness of time proceed from it.

In many cases the two forms of prescription coincide. The property which one person loses through long dispossession is often at the same time acquired by some one else through long possession. Yet this is not always so, and it is necessary in many instances to know whether legal effect is given to long possession, in which case the prescription is positive, or to long want of possession, in which case the prescription is negative. I may, for example, be continuously out of possession of my land for twelve years, without any other single person having continuously held possession of it for that length of time. It may have been in the hands of a series of trespassers against me and against each other. In this case, if the legally recognised form of prescription is positive, it is inoperative, and I retain my ownership. But if the law recognises negative prescription instead of positive (as in this case our own system does) my title will be extinguished. Who in such circumstances will acquire the right which I thus lose, depends not on the law of prescription, but on the rules as to the acquisition of things which have no owner. The doctrine that prior possession is a good title against all but the true owner, will confer on the first of a series of adverse possessors a good title against all the world so soon as the title of the true owner has been extinguished by negative prescription.

The rational basis of prescription is to be found in the presumption of the coincidence of possession and ownership, of fact and of right. Owners are usually possessors, and possessors are usually owners. Fact and right are normally coincident; therefore the former is evidence of the latter. That a thing is possessed *de facto* is evidence that it is owned *de jure*. That it is not possessed raises a presumption that it is not owned either. Want of possession is evidence of want of title. The longer the possession or want of possession has continued, the greater is its evidential value. That I have occupied land for a day raises a very slight presumption that I am the owner of it; but if I continue to occupy it for twenty years, the presumption becomes indefinitely stronger. If I have a claim of debt against a man, unfulfilled and unenforced, the lapse of six months may have but little weight as evidence that my claim is unfounded or that it has been already satisfied; but the lapse of ten years may amount to ample proof of this.

If, therefore, I am in possession of anything in which I claim a right, I have evidence of my right which differs from all other evidence, inasmuch as it grows stronger instead of weaker with the lapse of years. The tooth of time may eat away all other proofs of title. Documents are lost, memory fails, witnesses die. But as these become of no avail, an efficient substitute is in the same measure provided by the probative force of long possession. So also with long want of possession as evidence of want of title; as the years pass, the evidence in favour of the title fades, while the presumption against it grows ever stronger.

Here, then, we have the chief foundation of the law of prescription. For in this case, as in so many others, the law has deemed it expedient to confer upon a certain species of evidence conclusive force. It has established a conclusive presumption in favour of the rightfulness of long possession, and against the validity of claims which are vitiated by long want of possession. Lapse of time is recognised as creative and destructive of rights, instead of merely as evidence for and against their existence. In substance, though not always in form, prescription has been advanced from the law of evidence to a place in the substantive law.

The conclusive presumption on which prescription is thus founded falls, like all other conclusive presumptions, more or less wide of the truth. Yet in the long run, if used with due safeguards, it is the instrument of justice. It is not true as a matter of fact that a claim unenforced for six years is always unfounded, but it may be wise for the law to act as if it were true. For the effect of thus exaggerating the evidential value of lapse of time is to prevent the persons concerned from permitting such delays as would render their claims in reality doubtful. In order to avoid the difficulty and error that necessarily result from the lapse of time, the presumption of the coincidence of fact and right is rightly accepted as final after a certain number of years. Whoever wishes to dispute this presumption must do so within that period; otherwise his right, if he has one, will be forfeited as a penalty for his neglect. *Vigilantibus non dormientibus jura subveniunt.*

Prescription is not limited to rights *in rem.* It is found within the sphere of obligations as well as within that of property. Positive prescription, however, is possible only in the case of rights which admit of possession—that is to say, continuing exercise and enjoyment. Most rights of this nature are rights *in rem.* Rights *in personam* are commonly extinguished by their exercise, and therefore cannot be possessed or acquired by prescription. And even in that minority of cases in which such rights do admit of possession, and in which positive prescription is therefore theoretically possible, modern law, at least, has seen no occasion for allowing it. This form of prescription, therefore, is peculiar to the law of property. Negative prescription, on the other hand, is common to the law of property and to that of obligations. Most obligations are destroyed by the lapse of time, for since the ownership of them cannot be accompanied by the possession of them, there is nothing to preserve them from the destructive influence of delay in their enforcement (*u*).

Negative prescription is of two kinds, which may be distinguished as perfect and imperfect. The latter is commonly called the limitation of actions, the former being then distinguished as prescription in a narrow and specific sense. Perfect prescription is the destruction of the principal right itself, while imperfect prescription is merely the destruction of the accessory *right of action*, the principal right remaining in existence. In other words, in the one case the right is wholly destroyed, but in the other it is merely reduced from a perfect and enforceable right to one which is imperfect and unenforceable.

An example of perfect prescription is the destruction of the ownership of land through dispossession for twelve years. The owner of land who has been out of possession for that period does not merely lose his right of action for the recovery of it, but also loses the right of ownership itself. An example of imperfect prescription, on the other hand, is the case of the owner of a chattel who has been out of possession of it for six years. He loses his right of action for the recovery of it, but he remains the owner of it none the less. His ownership is reduced from a perfect to an imperfect right, but it still subsists. Similarly a creditor loses in six years his right of action for the debt; but the debt itself is not extinguished, and continues to be due and owing.

(*u*) It is clear, however, that until a debt or other obligation is actually due and enforceable, no presumption against its validity can arise through the lapse of time. Therefore prescription runs, not from the day on which the obligation first arises, but from that on which it first becomes enforceable. *Agere non valenti non currit praescriptio.*

§ 163. Agreement.

We have already considered the general theory of agreement as a title of right. It will be remembered that we used the term to include not merely contracts but all other bilateral acts in the law, that is to say, all expressions of the consenting wills of two or more persons directed to an alteration of their legal relations. Agreement in this wide sense is no less important in the law of property than in that of obligations.

As a title of proprietary rights *in rem*, agreement is of two kinds, namely assignment and grant. By the former, existing rights are transferred from one owner to another; by the latter, new rights are created by way of encumbrance upon the existing rights of the grantor. The grant of a lease of land is the creation by agreement, between grantor and grantee, of a leasehold vested in the latter and encumbering the freehold vested in the former. The assignment of a lease, on the other hand, is the transfer by agreement of a subsisting leasehold from the assignor to the assignee.

Agreement is either formal or informal. We have already sufficiently considered the significance of this formal element in general. There is, however, one formality known to the law of property which requires special notice, namely, the delivery of possession. That *traditio* was an essential element in the voluntary transfer of *dominium* was a fundamental principle of Roman law. *Traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur* (*x*). So in English law, until the year 1845, land could in theory be conveyed in no other method than by the delivery of possession. No deed of conveyance was in itself of any effect. It is true that in practice this rule was for centuries evaded by taking advantage of that fictitious delivery of possession which was rendered possible by the Statute of Uses. But it was only by virtue of a modern statute (*y*), passed in the year mentioned, that the ownership of land came in legal theory to be capable of transfer without the possession of it. In the case of chattels the common law itself succeeded, centuries ago, in cutting

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(*x*) C. 2. 3. 20.

(*y*) Stat. 8 & 9 Vict. c. 106, s. 2.

down to a very large extent the older principle. Chattels can be assigned by deed without delivery, and also by sale without delivery. But a *gift* of chattels requires to this day to be completed by the transfer of possession (*z*).

In this requirement of *traditio* we may see a curious remnant of an earlier phase of thought. It is a relic of the times when the law attributed to the fact of possession a degree of importance which at the present day seems altogether disproportionate. Ownership seems to have been deemed little more than an accessory of possession. An owner who had ceased to possess had almost ceased to own, for he was deprived of his most important rights. A person who had not yet succeeded in obtaining possession was not an owner at all, however valid his claim to the possession may have been. The transfer of a thing was conceived as consisting essentially in the transfer of the possession of it. The transfer of *rights*, apart from the visible transfer of *things*, had not yet been thought of.

So far as the requirement of *traditio* is still justifiably retained by the law, it is to be regarded as a formality accessory to the agreement, and serving the same purposes as other formalities. It supplies evidence of the agreement, and it preserves for the parties a *locus poenitentiae*, lest they be prematurely bound by unconsidered consent.

It is a leading principle of law that the title of a grantee or assignee cannot be better than that of his grantor or assignor. *Nemo plus juris ad alium transferre potest, quam ipse haberet* (*a*). No man can transfer or encumber a right which is not his. To this rule, however, there is a considerable number of important exceptions. The rule is ancient, and most of the exceptions are modern; and we may anticipate that the future course of legal development will show further derogations from the early principle. There are two conflicting interests in the matter. The older rule is devised for the security of established titles. Under its protection he who succeeds in obtaining a perfect title may sit down in peace and keep his property against all the world. The exceptions, on

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(*z*) *Cochrane* v. *Moore*, 25 Q. B. D. 57.

(*a*) D. 50. 17. 54.

the contrary, are established in the interests of those who seek to *acquire* property, not of those who seek to *keep* it. The easier it is to acquire a title with safety, the more difficult it is to keep one in safety; and the law must make a compromise between these two adverse interests. The modern tendency is more and more to sacrifice the security of tenure given by the older rule, to the facilities for safe and speedy acquisition and disposition given by the exceptions to it.

These exceptions are of two kinds: (1) those due to the separation of legal from equitable ownership, and (2) those due to the separation of ownership from possession. We have seen already that when the legal ownership is in one man and the equitable in another, the legal owner is a trustee for the equitable. He holds the property on behalf of that other, and not for himself; and the obligation of this trusteeship is an encumbrance upon his title. Yet he may, none the less, give an unencumbered title to a third person, provided that that person gives value for what he gets, and has at the time no knowledge of the existence of the trust. This rule is known as the equitable doctrine of purchase for value without notice. No man who ignorantly and honestly purchases a defective legal title can be affected by any adverse equitable title vested in any one else. To this extent a legal owner can transfer to another more than he has himself, notwithstanding the maxim. *Nemo dat qui non habet.*

The second class of exceptions to the general principle includes the cases in which the possession of a thing is in one person and the ownership of it in another. Partly by the common law, and partly by various modern statutes, the possessor is in certain cases enabled to give a good title to one who deals with him in good faith believing him to be the owner. The law allows men in these cases to act on the presumption that the possessor of a thing is the owner of it; and he who honestly acts on this presumption will acquire a valid title in all events. The most notable example is the case of negotiable instruments. The possessor of a bank-note may have no title to it; he may have found it or stolen it; but he can give a good title to any one who takes it from him for value and in good faith. Similarly mercantile agents, in possession of goods belonging to their principals, can effectively transfer the ownership of them (*b*) whether they are authorised thereto or not (*c*).

§ 164. Inheritance.

The fourth and last mode of acquisition that we need consider is Inheritance. In respect of the death of their owners all rights are divisible into two classes, being either inheritable or uninheritable. A right is inheritable if it survives its owner; uninheritable if it dies with him. This division is to a large extent, though far from completely, coincident with that between proprietary and personal rights. The latter are in almost all cases so intimately connected with the personality of him in whom they are vested, that they are incapable of separate and continued existence. They are not merely *divested* by death (as are rights of every sort), but are wholly *extinguished*. In exceptional cases, however, this is not so. Some personal rights are inheritable, just as property is, an instance being the status of hereditary nobility and the political and other privileges accessory thereto.

Proprietary rights, on the other hand, are usually inheritable. In respect of them death is a divestitive, but not an extinctive fact. The exceptions, however, are numerous. A lease may be for the life of the lessee instead of for a fixed term of years. Joint ownership is such that the right of him who dies first is wholly destroyed, the survivor acquiring an

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(*b*) The Factors Act, 1889.

(*c*) Continental systems carry much further than our own the doctrine that the possessor of a chattel may confer a good title to it. Article 2279 of the French Civil Code lays down the general principle that *En fait de meubles la possession vaut titre.* In other words the ownership of a chattel involves no *droit de suite* or *jus sequelae*, no right of following the thing into the hands of third persons who have obtained it in good faith. The rule, however, is subject to important exceptions, for it does not apply either to chattels stolen or to chattels lost. Speaking generally, therefore, it is applicable only where an owner has voluntarily entrusted the possession of the thing to some one else, as a pledgee, borrower, depositee, or agent, who has wrongfully disposed of it to some third person. Baudry-Lacantinerie, De la Prescription, ch. 20. See also, for very similar law, the German Civil Code, sects. 932—935, and the Italian Civil Code, sects. 707—708.

exclusive title by the *jus accrescendi* or right of survivorship. Rights of action for a tort die with the person wronged, except so far as the rule of the common law has been altered by statute. In the great majority of cases, however, death destroys merely the ownership of a proprietary right, and not the right itself.

The rights which a dead man thus leaves behind him vest in his *representative*. They pass to some person whom the dead man, or the law on his behalf, has appointed to represent him in the world of the living. This representative bears the person of the deceased, and therefore has vested in him all the inheritable rights, and has imposed upon him all the inheritable liabilities of the deceased. Inheritance is in some sort a legal and fictitious continuation of the personality of the dead man, for the representative is in some sort identified by the law with him whom he represents. The rights which the dead man can no longer own or exercise *in propria persona*, and the obligations which he can no longer *in propria persona* fulfil, he owns, exercises, and fulfils in the person of a living substitute. To this extent, and in this fashion, it may be said that the legal personality of a man survives his natural personality, until, his obligations being duly performed, and his property duly disposed of, his representation among the living is no longer called for (*d*).

The representative of a dead man, though the property of the deceased is vested in him, is not necessarily the beneficial owner of it. He holds it on behalf of two classes of persons, among whom he himself may or may not be numbered. These are the creditors and the beneficiaries of the estate. Just as many of a man's rights survive him, so also do many of his liabilities; and these inheritable obligations pass to his representative, and must be satisfied by him. Being, however, merely the representative of another, he is not liable *in propria persona*, and his responsibility is limited by the amount of the property which he has acquired from the deceased. He possesses a double personality or capacity, and

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(*d*) Hereditas . . . personam . . . defuncti sustinet. D. 41. 1. 34. See Holmes, Common Law, pp. 341—353. Maine, Ancient Law, pp. 181—182.

that which is due from him in right of his executorship cannot be recovered from him in his own right.

The beneficiaries, who are entitled to the residue after satisfaction of the creditors, are of two classes: (1) those nominated by the last will of the deceased, and (2) those appointed by the law in default of any such nomination. The succession of the former is testamentary (*ex testamento*); that of the latter is intestate (*ab intestato*). As to the latter there is nothing that need here be said, save that the law is chiefly guided by the presumed desires of the dead man, and confers the estate upon his relatives in order of proximity. In default of any known relatives the property of an intestate is claimed by the state itself, and goes as *bona vacantia* to the Crown.

Testamentary succession, on the other hand, demands further consideration. Although a dead man has no rights, a man while yet alive has the right to determine the disposition after he is dead of the property which he leaves behind him. His last will, duly declared in the document which we significantly call by that name, is held inviolable by the law. For half a century and more, the rights and responsibilities of living men may thus be determined by an instrument which was of no effect until the author of it was in his grave and had no longer any concern with the world or its affairs. This power of the dead hand (*mortua manus*) is so familiar a feature in the law, that we accept it as a matter of course, and have some difficulty in realising what a singular phenomenon it in reality is.

It is clear that some limitation must be imposed by the law upon this power of the dead over the living, and these restrictions are of three chief kinds:

(1) *Limitations of time.* It is only during a limited period after his death, that the directions of a testator as to the disposition of his property are held valid. He must so order the destination of his estate that within this period the whole of it shall become vested absolutely in some one or more persons, free from all testamentary conditions and restrictions. Any attempt to retain the property *in manu mortua* beyond

that limit makes the testamentary disposition of it void. In English law the period is determined by a set of elaborate rules which we need not here consider.

(2) *Limitations of amount.* A second limitation of testamentary power, imposed by most legal systems, though not by our own, is that a testator can deal with a certain proportion of his estate only, the residue being allotted by the law to those to whom he owes a duty of support, namely, his wife and children.

(3) *Limitations of purpose.* The power of testamentary disposition is given to a man that he may use it for the benefit of other men who survive him; and to this end only can it be validly exercised. The dead hand will not be suffered to withdraw property from the uses of the living. No man can validly direct that his lands shall lie waste, or that his money shall be buried with him or thrown into the sea (*e*).

SUMMARY.

Divisions of the substantive civil law:
    1. Law of Property—Proprietary rights *in rem*.
    2. Law of Obligations—Proprietary rights *in personam*.
    3. Law of Status—Personal rights.
Meanings of the term property:
    1. All legal rights.
    2. All proprietary rights.
    3. All proprietary rights *in rem*.
    4. Rights of ownership in material things.
Divisions of the law of property:
    1. Ownership of material things—Corporeal property.
    2. Rights *in re propria* in immaterial things: *e.g.*, patents and trade-marks.
    3. Rights *in re aliena* over material or immaterial things: *e.g.*, leases, trusts, and securities.
The ownership of material things.
    Its essential qualities:
        1. Generality.
        2. Permanence.
        3. Inheritance.
    Ownership of land in English law.

(*e*) *Brown* v. *Burdett*, 21 Ch. D. 667.

- Movable and immovable property. Land and chattels.
    - Movable and immovable rights.
    - The local situation of rights.
- Real and personal property.
    - Meanings of the term chattel.
- Rights *in re propria* in immaterial things:
    1. Patents.
    2. Literary copyright.
    3. Artistic copyright.
    4. Musical and dramatic copyright.
    5. Good-will, trade-marks, and trade-names.
- Encumbrances over property:
    1. Leases.
        - Their nature.
        - Their subject-matter.
        - Their duration.
    2. Servitudes.
        - Their nature.
        - Their kinds:
            1. Public and private.
            2. Appurtenant and in gross.
    3. Securities.
        - Their nature.
        - Mortgages and Liens.
        - The essential nature of a mortgage.
            - Equities of redemption.
        - Mortgages { By way of assignment. / By way of encumbrance.
        - The double ownership of mortgaged property.
        - The reduction of mortgages to liens.
        - The kinds of liens.
- Modes of acquiring property:
    - I. Possession.
        1. Absolute title to *res nullius*. Absolute ownership.
        2. Relative title to *res aliena*. Possessory ownership.
    - II. Prescription.
        1. Positive or acquisitive.
        2. Negative or extinctive.
        - Rational basis of prescription.
            - Presumption of coincidence of possession and ownership.
        - Classes of rights subject to prescription.
        - Prescription { Perfect. / Imperfect—the limitation of actions.

III. Agreement.
        1. Assignment.
        2. Grant.
        1. Formal.
        2. Informal.
    The efficacy of agreement.
        Nemo dat qui non habet.
            Exceptions:
                1. Separation of legal and equitable ownership.
                2. Separation of ownership and possession.
IV. Inheritance.
    Rights { Inheritable. / Uninheritable.
    The representatives of dead men.
    The creditors of dead men.
    The beneficiaries of dead men.
        1. *Ab intestato.*
        2. *Ex testamento.*
    The limits of testamentary power.

CHAPTER XXI.

THE LAW OF OBLIGATIONS.

§ 165. The Nature of Obligations.

OBLIGATION in its popular sense is merely a synonym for duty. Its legal sense, derived from Roman law, differs from this in several respects. In the first place, obligations are merely one class of duties, namely, those which are the correlatives of rights *in personam*. An obligation is the *vinculum juris*, or bond of legal necessity, which binds together two or more determinate individuals (*a*). It includes, for example, the duty to pay a debt, to perform a contract, or to pay damages for a tort, but not the duty to refrain from interference with the person, property, or reputation of others. Secondly, the term obligation is in law the name, not merely of the duty, but also of the correlative right. It denotes the legal relation or *vinculum juris* in its entirety, including the right of the one party, no less than the liability of the other. Looked at from the point of view of the person entitled, an obligation is a right; looked at from the point of view of the person bound, it is a duty. We may say either that the creditor acquires, owns, or transfers an obligation, or that the debtor has incurred or been released from one. Thirdly and lastly, all obligations pertain to the sphere of *proprietary* rights. They form part of the estate of him who is entitled to them. Rights which relate to a person's *status*, such as those created by marriage, are not obligations, even though they are rights *in personam*. An obligation, therefore, may be defined as a proprietary right *in personam* or a duty which corresponds to such a right.

The person entitled to the benefit of an *obligatio* was in Roman law termed *creditor*, while he who was bound by it was called *debitor*. We may venture to use the corresponding

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(*a*) Obligatio est juris vinculum, quo necessitate adstringimur alicuius solvendae rei, secundum nostrae civitatis jura. Inst. 3. 13, pr.

English terms creditor and debtor in an equally wide sense. We shall speak of every obligation, of whatever nature, as vested in or belonging to a creditor, and availing against a debtor. There is, of course, a narrower sense, in which these terms are applicable only to those obligations which constitute *debts*; that is to say, obligations to pay a definite or liquidated sum of money.

A technical synonym for obligation is *chose in action* or *thing in action*. A chose in action means, in our modern use of it, a proprietary right *in personam*; for example, a debt, a share in a joint-stock company, money in the public funds, or a claim for damages for a tort. A non-proprietary right *in personam*, such as that which arises from a contract to marry, or from the contract of marriage, is no more a chose in action in English law than it is an *obligatio* in Roman law.

Choses in action are opposed to choses in possession, though the latter term has all but fallen out of use. The true nature of the distinction thus expressed has been the subject of much discussion. At the present day, if any logical validity at all is to be ascribed to it, it must be identified with that between real and personal rights, that is to say, with the Roman distinction between *dominium* and *obligatio*. A chose in action is a proprietary right *in personam*. All other proprietary rights (including such objects of rights as are identified with the rights themselves) are choses in possession. If we regard the matter historically, however, it becomes clear that this is not the original meaning of the distinction. In its origin a chose in possession was any thing or right which was accompanied by *possession*; while a chose in action was any thing or right of which the claimant had no possession, but which he must obtain, if need be, by way of an *action* at law. Money in a man's purse was a thing in possession; money due to him by a debtor was a thing in action. This distinction was largely, though not wholly, coincident with that between real and personal rights, for real rights are commonly possessed as well as owned, while personal rights are commonly owned but not possessed. This coincidence, however, was not complete. A chattel, for example, stolen from its owner was reduced, so far as he was concerned, to a thing in action; but his right of ownership was not thereby reduced to a mere *obligatio* (*b*).

The extraordinary importance attributed to the fact of possession

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(*b*) Jacob's Law Dictionary, cited by Mr. Sweet in L. Q. R., X. at p. 308 n.

was a characteristic feature of our early law. As this importance diminished, the original significance of the distinction between things in possession and things in action was lost sight of, and these terms gradually acquired a new meaning. Originally shares and annuities would probably have been classed as things in possession, but they are now things in action. Conversely lands and chattels are now things in possession, whether the owner retains possession of them or not. Obligations were always the most important species of things in action, and they are now the only species. Neither the old law nor the new gives any countenance to the suggestion made by some that immaterial property, such as patents, copyrights, and trade-marks, should be classed as choses in action (*c*).

§ 166. Solidary Obligations.

The normal type of obligation is that in which there is one creditor and one debtor. If often happens, however, that there are two or more creditors entitled to the same obligation, or two or more debtors under the same liability. The case of two or more creditors gives rise to little difficulty, and requires no special consideration. It is, in most respects, merely a particular instance of co-ownership, the co-owners holding either jointly or in common, according to circumstances. The case of two or more debtors, however, is of some theoretical interest, and calls for special notice.

Examples of it are debts owing by a firm of partners, debts owing by a principal debtor and guaranteed by one or more sureties, and the liability of two or more persons who together commit a tort. In all such cases each debtor is liable for the whole amount due. The creditor is not obliged to divide his claim into as many different parts as there are debtors. He may exact the whole sum from one, and leave that one to recover from his co-debtors, if possible and permissible, a just proportion of the amount so paid. A debt of £100 owing by two partners, A. and B., is not equivalent to one debt of £50 owing by A. and another of the same amount owing by B. It

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(*c*) As to the nature of choses in action, see Blackstone, 11, 396; *Colonial Bank* v. *Whinney*, 30 Ch. D. 261 and 11 A. C. 426; and a series of articles by different writers in the L. Q. R.: IX. 311, by Sir Howard Elphinstone; X. 143, by T. C. Williams; X. 303, by C. Sweet; XI. 64, by S. Brodhurst; XI. 223, by T. C. Williams; XI. 238, by C. Sweet.

is a single debt of £100 owing by each of them, in such fashion that each of them may be compelled to pay the whole of it, but that when it is once paid by either of them, both are discharged from it (*d*).

Obligations of this description may be called solidary, since in the language of Roman law, each of the debtors is bound *in solidum* instead of *pro parte*; that is to say, for the whole, and not for a proportionate part. A solidary obligation, therefore, may be defined as one in which two or more debtors owe the same thing to the same creditor. In English law they are of three distinct kinds, being either (1) several, (2) joint, or (3) joint and several.

1. Solidary obligations are several when, although the thing owed is the same in each case, there are as many distinct obligations and causes of action as there are debtors. Each debtor is bound to the creditor by a distinct and independent *vinculum juris*, the only connection between them being that in each case the subject-matter of the obligation is the same, so that performance by one of the debtors necessarily discharges all the others also.

2. Solidary obligations are joint, on the other hand, when, though there are two or more debtors, there is only one debt or other cause of action, as well as only one thing owed. The *vinculum juris* is single, though it binds several debtors to the same creditor. The chief effect of this unity of the obligation is that all the debtors are discharged by anything which discharges any one of them. When the *vinculum juris* has once been severed as to any of them, it is severed as to all. Where, on the contrary, solidary obligations are several and not joint, performance by one debtor will release the others, but in all other respects the different *vincula juris* are independent of each other.

3. The third species of solidary obligations consists of those which are both joint and several. As their name implies, they stand half-way between the two extreme types which we have

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(*d*) As we shall see, the creditor is not always entitled to *sue* one alone of the debtors; but when he has obtained judgment against all, he can always, by way of execution, obtain payment of the whole from any one.

already considered. They are the product of a compromise between two competing principles. For some purposes the law treats them as joint, and for other purposes as several. For some purposes there is in the eye of the law only one single obligation and cause of action, while for other purposes the law consents to recognise as many distinct obligations and causes of action as there are debtors.

On what principle, then, does the law determine the class to which any solidary obligation belongs? Speaking generally, we may say that such obligations are several when, although they have the same subject-matter, they have different sources; they are several in their nature, if they are distinct in their origin. They are joint, on the other hand, when they have not merely the same subject-matter, but the same source. Joint and several obligations, in the third place, are those joint obligations which the law, for special reasons, chooses to treat in special respects as if they were several. Like those which are purely and simply joint, they have the same source as well as the same subject-matter; but the law does not regard them consistently as comprising a single *vinculum juris*.

The following are examples of solidary obligations which are several in their nature:—

(1) The liability of a principal debtor and that of his surety, provided that the contract of suretyship is subsequent to, or otherwise independent of the creation of the debt so guaranteed. But if the two debts have the same origin, as where the principal debtor and the surety sign a joint bond, the case is one of joint obligation.

(2) The liability of two or more co-sureties who guarantee the same debt independently of each other (*f*). They may make themselves joint, or joint and several debtors, on the other hand, by joining in a single contract of guarantee.

(3) Separate judgments obtained in distinct actions against two or more persons liable for the same debt. Two persons, for example, jointly and severally liable on the same contract may be separately sued, and judgment may be obtained against each of them. In such a case they are no longer jointly liable at all; each is now severally liable for the amount of his own judgment; but these two obligations are solidary, inasmuch as the satisfaction of one will discharge the other.

(*f*) *Ward* v. *The National Bank*, 8 A. C. 755.

(4) The liability of independent wrongdoers whose acts cause the same damage. This is a somewhat rare case, but is perfectly possible. Two persons are not joint wrongdoers, simply because they both act wrongfully and their acts unite to cause a single mischievous result. They must have committed a joint act; that is to say, they must have acted together with some common purpose. If not, they may be liable *in solidum* and severally for the common harm to which their separate acts contribute; but they are not liable as joint wrongdoers. In *Thompson* v. *The London County Council* (*g*) the plaintiff's house was injured by the subsidence of its foundations, this subsidence resulting from excavations negligently made by A., taken in conjunction with the negligence of B., a water company, in leaving a water-main insufficiently stopped. It was held that A. and B., inasmuch as their acts were quite independent of each other, were not joint wrongdoers, and could not be joined in the same action. It was said by Lord Justice Collins (*h*): "The damage is one, but the causes of action which have led to that damage are two, committed by two distinct personalities." The liability of the parties was solidary, but not joint (*i*). So also successive acts of wrongful conversion may be committed by two or more persons in respect of the same chattel. Each is liable in the action of trover to the owner of the chattel for its full value. But they are liable severally, and not jointly. The owner may sue each of them in different actions; though payment of the value by any one of them will discharge the others (*k*).

Examples of joint obligations are the debts of partners, and all other solidary obligations *ex contractu* which have not been expressly made joint and several by the agreement of the parties.

Examples of joint and several obligations are the liabilities of those who jointly commit a tort or breach of trust, and also all contractual obligations which are expressly made joint and several by the agreement of the parties.

§ 167. The Sources of Obligations.

Classed in respect of their sources or modes of origin, the obligations recognised by English law are divisible into the following four classes:

(1) Contractual—*Obligationes ex contractu.*

(2) Delictal—*Obligationes ex delicto.*

(*g*) (1899) 1 Q. B. 840.

(*h*) At p. 845.

(*i*) For another illustration, see *Sadler* v. *Great Western Ry. Coy.*, (1896) A. C. 450.

(*k*) *Morris* v. *Robinson*, 3 B. & C. 196; 27 R. R. 322.

(3) Quasi-contractual—*Obligationes quasi ex contractu.*
(4) Innominate.

§ 168. Obligations arising from Contracts.

The first and most important class of obligations consists of those which are created by contract. We have in a former chapter sufficiently considered the nature of a contract (*l*), and we there saw that it is that kind of agreement which creates rights *in personam* between the parties to it. Now of rights *in personam* obligations are the most numerous and important kind, and of those which are not obligations comparatively few have their source in the agreement of the parties. The law of contract, therefore, is almost wholly comprised within the law of obligations, and for the practical purposes of legal classification it may be placed there with sufficient accuracy. The coincidence, indeed, is not logically complete: a promise of marriage, for example, being a contract which falls within the law of status, and not within that of obligations. Neglecting, however, this small class of *personal* contracts, the general theory of contract is simply a combination of the general theory of agreement with that of obligation, and does not call for any further examination in this place (*m*).

§ 169. Obligations arising from Torts.

The second class of obligations consists of those which may be termed delictal, or in the language of Roman law *obligationes ex delicto.* By an obligation of this kind is meant the duty of making pecuniary satisfaction for that species of wrong which is known in English law as a *tort.* Etymologically this term is merely the French equivalent of the English wrong—tort (*tortum*), being that which is twisted, crooked, or wrong; just as right (*rectum*) is that which is

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(*l*) *Supra*, § 123.

(*m*) It is advisable to point out that the obligation to pay damages for a breach of contract is itself to be classed as contractual, no less than the original obligation to perform the contract.

The editor has been unable to find any older authority for the view, here seemingly preferred, that from a promise of marriage, even though such that its repudiation would entitle the promisee to sue for damages, no legal obligation should be considered to arise.

straight. As a technical term of English law, however, tort has become specialised in meaning, and now includes merely one particular class of civil wrongs.

A tort may be defined as a civil wrong, for which the remedy is an action for damages, and which is not solely the breach of a contract or the breach of a trust or other merely equitable obligation. This definition contains four essential elements, there being four kinds of wrongs excluded by it from the sphere of tort.

1. A tort is a civil wrong; crimes are wrongs, but are not in themselves torts, though there is nothing to prevent the same act from belonging to both these classes at once.

2. Even a civil wrong is not a tort, unless the appropriate remedy for it is an action for damages. There are several other forms of civil remedy besides this; for example, injunctions, specific restitution of property, and the payment of liquidated sums of money by way of penalty or otherwise Any civil injury which gives rise exclusively to one of these other forms of remedy stands outside the class of torts. The obstruction of a public highway, for example, is to be classed as a civil injury, inasmuch as it may give rise to civil proceedings instituted by the Attorney-General for an injunction; but although a civil injury, it is not a tort, save in those exceptional instances in which, by reason of special damage suffered by an individual, it gives rise to an action for damages at his suit.

3. No civil wrong is a tort, if it is exclusively the breach of a contract. The law of contracts stands by itself, as a separate department of our legal system, over against the law of torts; and to a large extent liability for breaches of contract and liability for torts are governed by different principles. It may well happen, however, that the same act is both a tort and a breach of contract, and this is so in at least two classes of cases.

(a) The first and simplest of these is that in which a man undertakes by contract the performance of a duty which lies on him already, independently of any contract. Thus he who refuses to return a borrowed chattel commits both a breach of contract and also the tort known as conversion: a breach of contract, because he promised expressly or impliedly to return the chattel; but not *merely* a breach of contract, and therefore also a tort, because he would have been equally liable for detaining another man's property, even if he had made no such contract at all.

(b) The second class of cases is one which involves considerable difficulty, and the law on this point cannot yet be said to have been thoroughly developed. In certain instances the breach of a contract made with one person creates liability towards another person, who is no party to the contract. It is a fundamental principle, indeed, that no person can sue on an *obligatio ex contractu*, except a party to the contract; nevertheless it sometimes happens that one person can sue *ex delicto* for the breach of a contract which was not made with him, but from the breach of which he has suffered unlawful damage. That is to say, a man may take upon himself, by a contract with A., a duty which does not already or otherwise rest upon him, but which, when it has once been undertaken, he cannot break without doing such damage to B., a third person, as the law deems actionable. Thus, if X. lends his horse to Y., who delivers it to Z., a livery-stable keeper, to be looked after and fed, and the horse is injured or killed by insufficient feeding, presumably Z. is liable for this, not only in contract to Y., but also in tort to X., the owner of the horse. It is true that, apart from his contract with Y., Z. was under no obligation to feed the animal; apart from the contract, this was a mere omission to do an act which he was not bound to do. Yet having taken this duty upon himself, he has thereby put himself in such a situation that he cannot break the duty without inflicting on the owner of the horse damage of a kind which the law deems wrongful. The omission to feed the horse, therefore, although a breach of contract, is not exclusively such, and is therefore a tort, inasmuch as it can be sued on by a person who is no party to the contract. How far damage thus caused to one man by the breach of a duty undertaken by contract with another is actionable as a tort at the suit of the former, is a question to be determined by the detailed rules of the concrete legal system, and need not be here considered (*n*).

Before the abolition of forms of action the relation between contract and tort was complicated and obscured by the existence of a class of fictitious torts—wrongs which were in reality pure breaches of contract and nothing more, and which nevertheless were remediable by delictal forms of action. Forms of action were classed as either contractual or delictal, but contractual actions were illogically allowed in cases in which there was no true contract, but only a quasi-contract; and delictal actions in cases in which there was no true tort, but a mere breach of contract. There seems to be no longer any occasion for recognising the existence of such quasi-torts, for they were merely a product of historical accident, which may and should be now eliminated from the law. They are a relic of the days when contractual remedies were so imperfectly developed that they had to be supplemented by the use of delictal remedies in cases of breach of contract. The contractual action of *assumpsit* is, in its origin, merely a variant of the delictal action of *case*. It is not surprising, therefore, that until the abolition of all forms of action, our law failed to draw with accuracy the line between torts and breaches of contract (*o*).

4. The fourth and last class of wrongs which are not torts consists of breaches of trusts or other equitable obligations. The original reason for their exclusion and separate classification is the historical fact that the law of trusts and equitable obligations originated and developed in the Court of Chancery, and was wholly unknown to those courts of common law in which the law of torts grew up. But even now, although the practical distinction between law and equity is largely abolished, it is still necessary to treat breaches of trust as a form of wrong distinct from torts, and to deal with them along with the law of trusts itself, just as breaches of contract are dealt with along with the law of contract. Torts, contracts, and trusts developed separately, the principles of liability in

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(*n*) A similar relation exists between breaches of contract and crimes. Breach of contract is not in itself a crime, any more than it is in itself a tort; yet by undertaking a contractual duty, a man may often put himself in such a position, that he cannot break the duty without causing such damage to third persons, as will create criminal liability. For example, a signalman's breach of his contractual duty to attend to the signals may amount to the crime of manslaughter if a fatal accident results from it.

(*o*) Salmond's Law of Torts, § 1.

each case are largely different, and they must be retained as distinct departments of the law.

By some writers a tort has been defined as the violation of a right *in rem*, giving rise to an obligation to pay damages. There is a tempting simplicity and neatness in this application of the distinction between rights *in rem* and *in personam*, but it may be gravely doubted whether it does in truth conform to the actual contents of the English law of torts. Most torts undoubtedly are violations of rights *in rem*, because most rights *in personam* are created by contract. But there are rights *in personam* which are not contractual, and the violation of which, if it gives rise to an action for damages, must be classed as a tort. The refusal of an innkeeper to receive a guest is a tort, yet it is merely the breach of a non-contractual right *in personam*. So with any actionable refusal or neglect on the part of a public official to perform his statutory duties on behalf of the plaintiff.

§ 170. Obligations arising from Quasi-Contracts.

Both in Roman and in English law there are certain obligations which are not in truth contractual, but which the law treats as if they were. They are contractual in law, but not in fact, being the subject-matter of a fictitious extension of the sphere of contract to cover obligations which do not in reality fall within it. The Romans called them *obligationes quasi ex contractu*. English lawyers call them quasi-contracts or implied contracts, or often enough contract simply and without qualification. We are told, for example, that a judgment is a contract, and that a judgment debt is a contractual obligation (*p*). "Implied [contracts]," says Blackstone (*q*), "are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform." "Thus it is that every person is bound, and hath virtually agreed, to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation, of the law" (*r*). So the same author speaks, much too widely indeed, of the "general implication and intendment of the courts of judicature that every man hath engaged to perform what his duty or justice requires (*s*).

(*p*) *Grant* v. *Easton*, 13 Q. B. D. 302.
(*q*) Commentaries, II. 443.
(*r*) *Ibid.* III. 159.
(*s*) *Ibid.* III. 162.

From a quasi-contract, or contract implied in *law*, we must carefully distinguish a contract implied in *fact*. The latter is a true contract, though its existence is only inferred from the conduct of the parties, instead of being expressed. Thus when I enter an omnibus, I impliedly, yet actually, agree to pay the usual fare. A contract implied in law, on the contrary, is merely fictitious, for the parties to it have not agreed at all, either expressly or tacitly.

In what cases, then, does the law recognise this fiction of quasi-contract? What classes of obligations are regarded as contractual in law, though they are not so in fact? To this question it is not possible to give any complete answer here. We can, however, single out two classes of cases which include most, though not all, of the quasi-contractual obligations known to English law.

1. In the first place, we may say in general that in the theory of the common law all *debts* are deemed to be contractual in origin. A debt is an obligation to pay a liquidated sum of money, as opposed to an obligation to pay an unliquidated amount, and as opposed also to all non-pecuniary obligations. Most debts are *obligationes ex contractu* in truth and in fact, but there are many which have a different source. A judgment creates a debt which is non-contractual; so, also, does the receipt of money paid by mistake or obtained by fraud. Nevertheless, in the eye of the common law they all fall within the sphere of contract; for the law conclusively presumes that every person who owes a debt has promised to pay it. "Whatever, therefore," says Blackstone (*t*), "the laws order any one to pay, that becomes instantly a debt which he hath beforehand contracted to discharge."

Hence it is, that a judgment debtor is in legal theory liable *ex contractu* to satisfy the judgment. "The liability of the defendant," says Lord Esher (*u*), "arises upon the implied contract to pay the

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(*t*) Commentaries, III. 160. "A cause of action of contract arises not merely where one party has broken a legally binding agreement with the other, but where two parties stand in such a mutual relation that a sum of money is legally due from the one to the other, in which case the law is said to imply a contract to pay the money." Clerk and Lindsell, Law of Torts, p. 1.

(*u*) *Grant* v. *Easton*, 13 Q. B. D. at p. 303.

amount of the judgment." Similarly all pecuniary obligations of restitution are in theory contractual, as in the case of money paid by mistake, or obtained by fraud or duress. "If the defendant," says Lord Mansfield (*x*), "be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action founded on the equity of the plaintiff's case, as it were upon a contract (*quasi ex contractu*, as the Roman law expresses it)." So also with pecuniary obligations of indemnity; when, for example, the goods of a stranger are distrained and sold by a landlord for rent due by his tenant, the law implies a promise by the tenant to repay their value to the owner thus deprived of them (*y*). A similar fictitious promise is the ground on which the law bases obligations of contribution. If, for example, two persons acting independently of each other guarantee the same debt, and one of them is subsequently compelled to pay the whole, he can recover half of the amount from the other, as due to him under a contract implied in law, although there is clearly none in fact.

2. The second class of quasi-contracts includes all those cases in which a person injured by a tort is allowed by the law to waive the tort and sue in contract instead. That is to say, there are certain obligations which are in truth delictal, and not contractual, but which may, at the option of the plaintiff, be treated as contractual if he so pleases. Thus if one wrongfully takes away my goods and sells them, he is guilty of the tort known as trespass, and his obligation to pay damages for the loss suffered by me is in reality delictal. Nevertheless, I may, if I think it to my interest, waive the tort, and sue him on a fictitious contract, demanding from him the payment of the money so received by him as having rightly sold the goods as my agent, and therefore as being indebted to me in respect of the price received by him; and he will not be permitted to plead his own wrongdoing in bar of any such claim (*z*). So if a man obtains money from me by fraudulent misrepresentation, I may sue him either in tort for damages for the deceit, or on a fictitious contract for the return of the money.

(*x*) *Moses* v. *Macferlan*, 2 Burr. 1005 at p. 1009.

(*y*) *Exall* v. *Partridge*, 8 T. R. 308; 4 R. R. 656.

(*z*) *Smith* v. *Baker*, L. R. 8 C. P. 350. See further as to the waiver of torts, *Lightly* v. *Clouston*, 9 R. R. 713; 1 Taunt. 112; *Phillips* v. *Homfray*, 24 Ch. D. at p. 461; Salmond, Law of Torts, § 43.

The reasons which have induced the law to recognise the fiction of quasi-contractual obligation are various. The chief of them, however, are the three following:—

(1) The traditional classification of the various forms of personal actions, as being based either on contract or on tort. This classification could be rendered exhaustive and sufficient only by forcing all liquidated pecuniary obligations into the contractual class, regardless of their true nature and origin. The theory that all common law actions are either contractual or delictal is received by the legislature even at the present day (*a*), and its necessary corollary is the doctrine of quasi-contract.

(2) The desire to supply a theoretical basis for new forms of obligation established by judicial decision. Here as elsewhere, legal fictions are of use in assisting the development of the law. It is easier for the courts to say that a man is bound to pay because he must be taken to have so promised, than to lay down for the first time the principle that he is bound to pay whether he has promised or not.

(3) The desire of plaintiffs to obtain the benefit of the superior efficiency of contractual remedies. In more than one respect, it was better in the old days of formalism to sue on contract than on any other ground. The contractual remedy of *assumpsit* was better than the action of debt, for it did not allow to the defendant the resource of wager of law. It was better than trespass and other delictal remedies, for it did not die with the person of the wrongdoer, but was available against his executors. Therefore plaintiffs were allowed to allege fictitious contracts, and to sue on them in *assumpsit*, whereas more logically their normal remedy would have been debt or some action *ex delicto*.

It seems clear that a rational system of law is free to get rid of the conception of quasi-contractual obligation altogether. No useful purpose is served by it at the present day. It still remains, however, part of the law of England, and requires recognition accordingly.

§ 171. Innominate Obligations.

The foregoing classification of obligations as either contractual, delictal, or quasi-contractual, is not exhaustive, for it is based on no logical scheme of division, but proceeds by simple enumeration only. Consequently, it is necessary to recognise a final and residuary class which we may term innominate, as having no comprehensive and distinctive

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(*a*) County Courts Act, 1888, s. 116. This classification of actions is discussed by Maitland in an appendix to Sir Frederick Pollock's Law of Torts.

title (*b*). Included in this class are the obligations of trustees towards their beneficiaries, a species, indeed, which would be sufficiently important and distinct to be classed separately as co-ordinate with the others which have been named, were it not for the fact that trusts are more appropriately treated in another branch of the law, namely, in that of property.

SUMMARY.

Obligations defined.
Choses in action.
Solidary obligations:
    Their nature.
    Their kinds:
        1. Several.
        2. Joint.
        3. Joint and several.
Contractual obligations.
Delictal obligations:
    The nature of a tort:
        1. A civil wrong.
        2. Actionable by way of damages.
        3. Not a mere breach of contract.
        4. Not a mere breach of trust or other equitable obligation.
Quasi-contractual obligations:
    The nature of quasi-contract.
    Instances of quasi-contracts.
    Reasons of their recognition.
Innominate obligations.

(*b*) Contracts which have no specific name are called by the civilians *contractus innominati*.

CHAPTER XXII.

THE LAW OF PROCEDURE.

§ 172. Substantive Law and the Law of Procedure.

It is no easy task to state with precision the exact nature of the distinction between substantive law and the law of procedure, and it will conduce to clearness if we first consider a plausible but erroneous explanation. In view of the fact that the administration of justice in its typical form consists in the application of remedies to the violations of rights, it may be suggested that substantive law is that which defines the *rights*, while procedural law determines the *remedies*. This application, however, of the distinction between *jus* and *remedium* is inadmissible. For, in the first place, there are many rights which belong to the sphere of procedure; for example, a right of appeal, a right to give evidence on one's own behalf, a right to interrogate the other party, and so on. In the second place, rules defining the remedy may be as much a part of the substantive law as are those which define the right itself. No one would call the abolition of capital punishment, for instance, a change in the law of criminal procedure. The substantive part of the criminal law deals, not with crimes alone, but with punishments also. So in the civil law, the rules as to the measure of damages pertain to the substantive law, no less than those declaring what damage is actionable; and rules determining the classes of agreements which will be specifically enforced are as clearly substantive as are those determining the agreements which will be enforced at all. To define procedure as concerned not with rights, but with remedies, is to confound the remedy with the process by which it is made available.

What, then, is the true nature of the distinction? The law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions —*jus quod ad actiones pertinet*—using the term action in a wide sense to include all legal proceedings, civil or criminal. All the residue is substantive law, and relates, not to the process of litigation, but to its purposes and subject-matter. Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated. Procedural law is concerned with affairs inside the courts of justice; substantive law deals with matters in the world outside.

A glance at the actual contents of the law of procedure will enable us to judge of the accuracy of this explanation. Whether I have a right to recover certain property is a question of substantive law, for the determination and the protection of such rights are among the ends of the administration of justice; but in what courts and within what time I must institute proceedings are questions of procedural law, for they relate merely to the modes in which the courts fulfil their functions. What facts constitute a wrong is determined by the substantive law; what facts constitute proof of a wrong is a question of procedure. For the first relates to the subject-matter of litigation, the second to the process merely. Whether an offence is punishable by fine or by imprisonment is a question of substantive law, for the existence and measure of criminal liability are matters pertaining to the end and purpose of the administration of justice. But whether an offence is punishable summarily or only on indictment is a question of procedure. Finally, it may be observed that, whereas the abolition of capital punishment would be an alteration of the substantive law, the abolition of imprisonment for debt was merely an alteration in the law of procedure. For punishment is one of the ends of the administration of justice, while imprisonment for debt was merely an instrument for enforcing payment.

So far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other.

Although the distinction between substantive law and procedure is sharply drawn in theory, there are many rules of procedure which, in their practical operation, are wholly or substantially equivalent to rules of substantive law. In such cases the difference between these two branches of the law is one of form rather than of substance. A rule belonging to one department may by a change of form pass over into the other without materially affecting the practical issue. In legal history such transitions are frequent, and in legal theory they are not without interest and importance.

Of these equivalent procedural and substantive principles there are at least three classes sufficiently important to call for notice here.

1. An exclusive evidential fact is practically equivalent to a constituent element in the title of the right to be proved. The rule of evidence that a contract can be proved only by a writing corresponds to a rule of substantive law that a contract is void unless reduced to writing. In the former case the writing is the exclusive evidence of title; in the latter case it is part of the title itself. In the former case the right exists but is imperfect, failing in its remedy through defect of proof. In the latter case it fails to come into existence at all. But for most purposes this distinction is one of form rather than of substance.

2. A conclusive evidential fact is equivalent to, and tends to take the place of, the fact proved by it. All conclusive presumptions pertain in form to procedure, but in effect to the substantive law. That a child under the age of seven years is incapable of criminal intention is a rule of evidence, but differs only in form from the substantive rule that no child under that age is punishable for a crime. That the acts of a servant done about his master's business are done with his master's authority was a conclusive presumption of law,

and pertained to procedure; but it was the forerunner and equivalent of our modern substantive law of employer's liability. A bond (that is to say, an admission of indebtedness under seal) was originally operative as being conclusive proof of the existence of the debt so acknowledged; but it is now itself creative of a debt; for it has passed from the domain of procedure into that of substantive law.

3. The limitation of actions is the procedural equivalent of the prescription of rights. The former is the operation of time in severing the bond between right and remedy; the latter is the operation of time in destroying the right. The former leaves an imperfect right subsisting; the latter leaves no right at all. But save in this respect their practical effect is the same, although their form is different.

The normal elements of judicial procedure are five in number, namely, Summons, Pleading, Proof, Judgment, and Execution. The object of the first is to secure for all parties interested an opportunity of presenting themselves before the court and making their case heard. Pleading formulates for the use of the court and of the parties those questions of fact or law which are in issue. Proof is the process by which the parties supply the court with the *data* necessary for the decision of those questions. Judgment is this decision itself, while execution, the last step in the proceeding, is the use of physical force in the maintenance of the judgment when voluntary submission is withheld. Of these five elements of judicial procedure one only, namely, proof, is of sufficient theoretical interest to repay such abstract consideration as is here in place. The residue of this chapter, therefore, will be devoted to an analysis of the essential nature of the law of evidence.

§ 173. Evidence.

One fact is evidence of another when it tends in any degree to render the existence of that other probable. The quality by virtue of which it has such an effect may be called its *probative force*, and evidence may therefore be defined as any fact which possesses such force. Probative force may be of any degree of intensity. When it is great enough to form a rational basis for the inference that the fact so evidenced really exists, the evidence possessing it is said to constitute *proof*.

It is convenient to be able to distinguish shortly between the fact which is evidence, and the fact of which it is evidence. The former may be termed the *evidential fact*, the latter the *principal fact*. Where, as is often the case, there is a chain of evidence, A. being evidence of B., B. of C., C. of D., and so on, each intermediate fact is evidential in respect of all that follow it and principal in respect of all that precede it.

1. Evidence is of various kinds, being, in the first place, either *judicial* or *extrajudicial*. Judicial evidence is that which is produced to the court; it comprises all evidential facts that are actually brought to the personal knowledge and observation of the tribunals. Extrajudicial evidence is that which does not come directly under judicial cognizance, but nevertheless constitutes an intermediate link between judicial evidence and the fact requiring proof. Judicial evidence includes all testimony given by witnesses in court, all documents produced to and read by the court, and all things personally examined by the court for the purposes of proof. Extrajudicial evidence includes all evidential facts which are known to the court only by way of inference from some form of judicial evidence. Testimony is extrajudicial when it is judicially known only through the relation of a witness who heard it. A confession of guilt, for example, is judicial evidence if made to the court itself, but extrajudicial if made elsewhere and proved to the court by some form of judicial evidence. Similarly, a document is judicial evidence if produced, extrajudicial if known to the court only through a copy, or through the report of a witness who has read it. So the *locus in quo* or the material subject-matter of a suit becomes judicial evidence when personally viewed by the court, but is extrajudicial when described by witnesses.

It is plain that in every process of proof some form of judicial evidence is an essential element. Extrajudicial evidence may or may not exist. When it is present, it forms an intermediate link or a series of intermediate links in a chain of proof, the terminal links of which are the principal fact at one end and the judicial evidence at the other. Judicial evidence requires production merely; extrajudicial evidence stands itself in need of proof.

2. In the second place, evidence is either *personal* or *real*. Personal evidence is otherwise termed *testimony*. It includes all kinds of statements regarded as possessed of probative force in respect of the facts stated. This is by far the most important form of evidence. There are few processes of proof that do not contain it—few facts that are capable of being proved in courts of justice otherwise than by the testimony of those who know them. Testimony is either oral or written, and either judicial or extrajudicial. There is a tendency to restrict the term to the judicial variety, but there is no good reason for this limitation. It is better to include under the head of testimony or personal evidence all statements, verbal or written, judicial or extrajudicial, so far as they are possessed of probative force. Real evidence, on the other hand, includes all the residue of evidential facts. Anything which is believed for any other reason than that someone has said so, is believed on real evidence. This, too, is either judicial or extrajudicial, though here also there is a tendency to restrict the term to the former use.

3. Evidence is either *primary* or *secondary*. Other things being equal, the longer any chain of evidence the less its probative force, for with each successive inference the risk of error grows. In the interests of truth, therefore, it is expedient to shorten the process, to cut out as many as possible of the intermediate links of extrajudicial evidence, and to make evidence assume the judicial form at the earliest practicable point. Hence the importance of the distinction between primary and secondary evidence. Primary evidence is evidence viewed in comparison with any available and less immediate instrument of proof. Secondary evidence is that which is compared with any available and more immediate instrument of proof. Primary evidence of the contents of a written document is the production in court of the document itself; secondary evidence is the production of a copy or of oral

testimony as to the contents of the original. Primary evidence that A. assaulted B. is the judicial testimony of C. that he saw the assault; secondary evidence is the judicial testimony of D. that C. told him that he saw the assault. That secondary evidence should not be used when primary evidence is available is, in its general form, a mere counsel of prudence; but in particular cases, the most important of which are those just used as illustrations, this counsel has hardened into an obligatory rule of law. Subject to certain exceptions, the courts will receive no evidence of a written document save the document itself, and will listen to no hearsay testimony.

4. Evidence is either *direct* or *circumstantial*. This is a distinction important in popular opinion rather than in legal theory. Direct evidence is testimony relating immediately to the principal fact. All other evidence is circumstantial. In the former case the only inference required is one from testimony to the truth of it. In the latter the inference is of a different nature, and is generally not single but composed of successive steps. The testimony of A. that he saw B. commit the offence charged, or the confession of B. that he is guilty, constitutes direct evidence. If we believe the truth of the testimony or confession, the matter is concluded, and no further process of proof or inference is required. On the other hand, the testimony of A. that B. was seen by him leaving the place where the offence was committed, and having the instrument of the offence in his possession, is merely circumstantial evidence; for even if we believe this testimony, it does not follow without a further inference, and therefore a further risk of error, that B. is guilty. Direct evidence is commonly considered to excel the other in probative force. This, however, is not necessarily the case, for witnesses lie, and facts do not. Circumstantial evidence of innocence may well prevail over direct evidence of guilt; and circumstantial evidence of guilt may be indefinitely stronger than direct evidence of innocence.

§ 174. The Valuation of Evidence.

The law of evidence comprises two parts. The first of these consists of rules for the measurement or determination of the *probative force* of evidence. The second consists of rules determining the modes and conditions of the *production* of evidence. The first deals with the effect of evidence when produced, the second with the manner in which it is to be produced. The first is concerned with evidence in all its forms, whether judicial or extrajudicial; the second is concerned with judicial evidence alone. The two departments are intimately connected, for it is impossible to formulate rules for the production of evidence without reference and relation to the effect of it when produced. Nevertheless the two are distinct in theory, and for the most part distinguishable in practice. We shall deal with them in their order.

In judicial proceedings, as elsewhere, the accurate measurement of the evidential value of facts is a condition of the discovery of truth. Except in the administration of justice, however, this task is left to common sense and personal discretion. Rules and maxims, when recognised at all, are recognised as proper for the *guidance* of individual judgment, not for the *exclusion* of it. But in this, as in every other part of judicial procedure, law has been generated, and, in so far as it extends, has made the estimation of probative force or the weighing of evidence a matter of inflexible rules excluding judicial discretion. These rules constitute the first and most characteristic portion of the law of evidence. They may be conveniently divided into five classes, declaring respectively that certain facts amount to:—

1. Conclusive proof—in other words, raise a conclusive presumption;

2. Presumptive proof—in other words, raise a conditional or rebuttable presumption;

3. Insufficient evidence—that is to say, do not amount to proof, and raise no presumption, conclusive or conditional;

4. Exclusive evidence—that is to say, are the only facts which in respect of the matter in issue possess any probative force at all;

5. No evidence—that is to say, are destitute of evidential value.

I. *Conclusive presumptions.*—By conclusive proof is meant a fact possessing probative force of such strength as not to admit of effective contradiction. In other words, this fact amounts to proof irrespective of the existence or non-existence of any other facts whatsoever which may possess probative force in the contrary direction. By a conclusive presumption is meant the acceptance or recognition of a fact by the law as conclusive proof.

Presumptive or conditional proof, on the other hand, is a fact which amounts to proof, only so long as there exists no other fact amounting to disproof. It is a provisional proof, valid until overthrown by contrary proof. A conditional or rebuttable presumption is the acceptance of a fact by the law as conditional proof (*a*).

One of the most singular features in early systems of procedure is the extent to which the process of proof is dominated by conclusive presumptions. The chief part of the early law of evidence consists of rules determining the species of proof which is necessary and sufficient in different cases, and allotting the benefit or burden of such proof between the parties. He who would establish his case must maintain it, for example, by success in that judicial battle the issue of which was held to be the judgment of Heaven (*judicium Dei*); or he must go unscathed through the ordeal and so make manifest his truth or innocence; or he must procure twelve men to swear in set form that they believe his testimony to be true; or it may be sufficient if he himself makes solemn oath that his cause is just. If he succeeds in performing the conditions so laid upon him, he will have judgment; if he fails even in the slightest point, he is defeated. His task is to satisfy the requirements of the law, not to convince the court of the truth of his case. What the court thinks of the matter is nothing to the point. The whole procedure seems designed to take away from the tribunals the responsibility of investigating the truth, and to

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(*a*) A conclusive presumption is sometimes called a *presumptio juris et de jure*, while a rebuttable presumption is distinguished as a *presumptio juris*. I am not aware of the origin or ground of this nomenclature. The so-called *presumptio facti* is not a legal presumption at all, but a mere provisional inference drawn by the court in the exercise of its unfettered judgment from the evidence before it.

cast this burden upon providence or fate. Only gradually and reluctantly did our law attain to the conclusion that there is no such royal road in the administration of justice, that the heavens are silent, that the battle goes to the strong, that oaths are naught and that there is no just substitute for the laborious investigation of the truth of things at the mouths of parties and witnesses.

The days are long since past in which conclusive presumptions played any great part in the administration of justice. They have not, however, altogether lost their early importance. They are, indeed, almost necessarily more or less false, for it is seldom possible in the subject-matter of judicial procedure to lay down with truth a general principle that any one thing is conclusive proof of the existence of any other. Nevertheless such principles may be just and useful even though not wholly true. We have already seen how they are often merely the procedural equivalents of substantive rules which may have independent validity. They have also been of use in developing and modifying by way of legal fictions the narrow and perverted principles of the early law. As an illustration of their employment in modern law we may cite the maxim *Res judicata pro veritate accipitur.* A judgment is conclusive evidence as between the parties, and sometimes as against all the world, of the matters adjudicated upon. The courts of justice may make mistakes, but no one will be heard to say so. For their function is to terminate disputes, and their decisions must be accepted as final and beyond question.

II. *Conditional presumptions.*—The second class of rules for the determination of probative force are those which establish rebuttable presumptions. For example, a person shown not to have been heard of for seven years by those who would naturally have heard of him if he had been alive, is presumed to be dead. So also a negotiable instrument is presumed to have been given for value. So also a person accused of any offence is presumed to be innocent.

Many of these presumptions are based on no real estimate of probabilities, but are established for the purpose of placing the burden of proof upon the party who is best able to bear it, or who may most justly be made to bear it. Persons accused of crime are probably guilty, but the presumption of their innocence is in most cases and with certain limitations clearly expedient.

III. *Insufficient evidence.*—In the third place the law contains rules declaring that certain evidence is insufficient, that its probative force falls short of that required for proof, and that it is therefore not permissible for the courts to act upon it. An example is the rule that in certain kinds of treason the testimony of one witness is insufficient—almost the sole recognition by English law of the general principle, familiar in legal history, that two witnesses are necessary for proof.

IV. *Exclusive evidence.*—In the fourth place there is an important class of rules declaring certain facts to be exclusive evidence, none other being admissible. The execution of a document which requires attestation can be proved in no other way than by the testimony of an attesting witness, unless owing to his death or some other circumstance his testimony is unavailable. A written contract can be proved in no other way than by the production of the writing itself, whenever its production is possible. Certain kinds of contracts, such as one for the sale of land, cannot be proved except by writing, no verbal testimony being of virtue enough in the law to establish the existence of them.

It is only in respect of very special kinds of contracts that written evidence can wisely be demanded by the law. In the case of all ordinary mercantile agreements such a requirement does more harm than good; and the law would do well in accepting the principle that a man's word is as good as his bond. The Statute of Frauds, by which most of these rules of exclusive evidence have been established, is an instrument for the encouragement of frauds rather than for the suppression of them. How much longer is it to remain in force as a potent instrument for the perversion of English law? Its repeal would sweep away at one stroke the immense accumulation of irrational technicality and complexity that has grown in the course of centuries from this evil root.

V. *Facts which are not evidence.*—Fifthly and lastly there are rules declaring that certain facts are not evidence, that is to say, are destitute of any probative force at all. Such facts are not to be produced to the court, and if produced no weight is to be attributed to them, for no accumulation of them can amount to proof. For example, hearsay is no evidence, the bond of connexion between it and the principal fact so reported at second hand being in the eye of the law too slight for any reliance to be justly placed upon it. Similarly the general bad character of an accused person is no evidence that he is guilty of any particular offence charged against him; although his good character is evidence of his innocence.

These rules of exclusion or irrelevancy assume two distinct forms, characteristic respectively of the earlier and later periods in the development of the law. At the present day they are almost wholly rules for the exclusion of *evidence;* in earlier times they were rules for the exclusion of *witnesses.* The law imposed testimonial incapacity upon certain classes of persons on the ground of their antecedent incredibility. No party to a suit, no person possessing any pecuniary interest in the event of it, no person convicted of any infamous offence, was a competent witness. His testimony was deemed destitute of evidential value on account of the suspicious nature of its source. The law has now learned that it is not in this fashion that the truth is to be sought for and found. It has now more confidence in individual judgment and less in general rules. It no longer condemns witnesses unheard, but receives the testimony of all, placing the old grounds of exclusion at their proper level as reasons for suspicion but not for antecedent rejection.

§ 175. The Production of Evidence.

The second part of the law of evidence consists of rules regulating its production. It deals with the process of adducing evidence, and not with the effect of it when adduced. It comprises every rule relating to evidence, except those which amount to legal determinations of probative force. It is concerned for example with the manner in which witnesses are to be examined and cross-examined, not with the weight to be attributed to their testimony. In particular it includes several important rules of exclusion based on grounds independent of any estimate of the probative force of the evidence so excluded. Considerations of expense, delay, vexation, and the public interest require much evidence to be excluded which is of undoubted evidential value. A witness may be able to testify to much that is relevant and important in respect of the matters in issue, and nevertheless may not be compelled or even permitted to give such testimony. A public official, for example, cannot be compelled to give evidence as to affairs of state, nor is a legal adviser permitted or compellable to disclose communications made to him by or on behalf of his client.

The most curious and interesting of all these rules of exclusion is the maxim, *Nemo tenetur se ipsum accusare*. No man, not even the accused himself, can be compelled to answer any question the answer to which may tend to prove him guilty of a crime. No one can be used as the unwilling instrument of his own conviction. He may confess, if he so pleases, and his confession will be received against him; but if tainted by any form of physical or moral compulsion, it will be rejected. The favour with which this rule has been received is probably due to the recoil of English law from the barbarities of the old Continental system of torture and inquisitorial process. Even as contrasted with the modern Continental procedure, in which the examination of the accused seems to English eyes too prominent and too hostile, the rule of English law is not without merits. It confers upon a criminal trial an aspect of dignity, humanity, and impartiality, which the contrasted inquisitorial process is too apt to lack. Nevertheless it seems impossible to resist Bentham's conclusion that the rule is destitute of any rational foundation, and that the compulsory examination of the accused is an essential feature of sound criminal procedure. Even its defenders admit that the English rule is extremely favourable to the guilty, and in a proceeding the aim of which is to convict the guilty, this would seem to be a sufficient condemnation. The innocent have nothing to fear from compulsory examination, and everything to gain; the guilty have nothing to gain, and everything to fear. A criminal trial is not to be adequately conceived as a fight between the accused and his accuser; and there is no place in it for maxims whose sole foundation is a supposed duty of generous dealing with adversaries. Subject always to the important qualification that a good *primâ facie* case must first be established by the prosecutor, every man should be compellable to answer with his own lips the charges that are made against him (*b*).

A matter deserving notice in connexion with this part of the law of evidence is the importance still attached to the ceremony of the oath. One of the great difficulties involved in the process of proof is that of distinguishing between true testimony and false. By what test is the lying witness to be detected, and by what means is corrupt testimony to be prevented? Three methods commended themselves to the wisdom of our ancestors. These were the judicial combat, the ordeal, and the oath. The first two of these have long since been abandoned as ineffective, but the third is still retained as a characteristic feature of judicial procedure, though we may assume with some confidence that its rejection will come in due time, and will in no way injure the cause of truth and justice.

Trial by battle, so soon as it acquired a theory at all, became in reality a form of ordeal. In common with the ordeal commonly so called, it is the *judicium Dei;* it is an appeal to the God of battles to make manifest the right by giving the victory to him whose testimony is true. Successful might is the divinely appointed test of right. So in the ordeal, the party or witness whose testimony is impeached calls upon Heaven to bear witness to his truth by saving him harmless from the fire. The theory of the oath is generically the same. "An oath," says Hobbes (*c*), "is a form of speech added to a promise; by which he that promiseth, signifieth that unless he perform, he renounceth the mercy of his God, or calleth to him for vengeance on himself. Such was the heathen

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(*b*) See Bentham, Works, VII. pp. 445–463, and Dumont, Treatise on Judicial Evidence, Book VII. ch. 11: "If all the criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? . . . One could be tempted to believe that those notions had been taken from the laws of honour which regulate private combats."

(*c*) Leviathan, ch. 14, Eng. Works, III. p. 129.

form, Let Jupiter kill me else, as I kill this beast. So is our form, I shall do thus and thus, so help me God." The definition is correct save that it is restricted to promissory, instead of including also declaratory, oaths. A man may swear not only that he will speak the truth, but that certain statements are the truth.

The idea of the oath, therefore, is that his testimony is true who is prepared to imprecate Divine vengeance on his own head in case of falsehood. Yet it needs but little experience of courts of justice to discover how ineffective is any such check on false witness and how little likely is the retention of it to increase respect either for religion or for the administration of justice. The true preventive of false testimony is an efficient law for its punishment as a crime (*d*).

SUMMARY.

- Law
  - Substantive—relating to the subject-matter of litigation.
  - Procedural—relating to the process of litigation.
- The occasional equivalence of substantive and procedural rules.
- Procedure. Its elements: Summons, Pleading, Proof, Judgment, and Execution.
- The Law of Evidence.
  - Evidence and proof defined.
  - Kinds of Evidence
    - Judicial and Extrajudicial.
    - Personal and Real.
    - Primary and Secondary.
    - Direct and Circumstantial.
  - Divisions of the Law of Evidence.
    - I. Rules determining probative force.
      1. Conclusive proof.
      2. Conditional proof.
      3. Insufficient evidence.
      4. Exclusive evidence.
      5. No evidence.
    - II. Rules determining the production of evidence.
      - Nemo tenetur se ipsum accusare.
      - Oaths.

(*d*) On the history of oaths, see Lea, Superstition and Force, Part I. ch. 2—8; Encyclopædia Britannica, *sub voc.* Oath; Hirzel, Der Eid (1902). As to their utility, see Bentham's Works, VI. 308—325.

APPENDICES.

I. *THE NAMES OF THE LAW.*

II. *THE THEORY OF SOVEREIGNTY.*

III. *THE MAXIMS OF THE LAW.*

IV. *THE DIVISIONS OF THE LAW.*

V. *THE TERRITORY OF THE STATE.*

VI. *INTERNATIONAL LAW.*

VII. *AUTHORITIES.*

APPENDIX I.

THE NAMES OF THE LAW.

The purpose of the following pages is to consider, in respect of their origin and relations, the various names and titles which have been borne by the law in different languages. This seems an inquiry fit to be undertaken in the hope that juridical terms may be found to throw some light upon the juridical ideas of which they are the manifestation. A comparison of diverse usages of speech may serve to correct misleading associations, or to suggest relations that may be easily overlooked by any one confining his attention to a single language.

The first fact which an examination of juridical nomenclature reveals, is that all names for law are divisible into two classes, and that almost every language possesses one or more specimens of each. To the first class belong such terms as *jus*, *droit*, *recht*, *diritto*, *equity*. To the second belong *lex*, *loi*, *gesetz*, *legge*, *law*, and many others. It is a striking peculiarity of the English language that it does not possess any *generic* term falling within the first of these groups; for equity, in the technical juridical sense, means only a special department of civil law, not the whole of it, and therefore is not coextensive with *jus*, *droit*, and the other foreign terms with which it is classed. Since, therefore, we have in English no pair of contrasted terms adequate for the expression of the distinction between these two groups of names, we are constrained to have recourse to a foreign language, and we shall employ for this purpose the terms *jus* and *lex*, using each as typical of and representing all other terms which belong to the same group as itself.

What, then, are the points of difference between *jus* and *lex*; what is the importance and the significance of the distinction between the two classes of terms? In the first place *jus* has an ethical as well as a juridical application, while *lex* is purely juridical. *Jus* means not only law but also right. *Lex* means law and not also right. Thus our own *equity* has clearly the double meaning; it means either the rules of natural justice, or that special department of the civil law which was developed and administered in the Court of Chancery. The English *law*, on the other hand, has a purely juridical application; justice in itself, and as such, has no claim to the name of *law*. So also with *droit* as opposed to *loi*, with *recht* as opposed to *gesetz*, with *diritto* as opposed to *legge*.

If we inquire after the cause of this duplication of terms we find it in the double aspect of the complete juridical conception of law. Law arises from the union of justice and force, of right and might. It is justice recognised and established by authority. It is right realised through power. Since, therefore, it has two sides and aspects, it may be looked at from two different points of view, and we may expect to find, as we find in fact, that it acquires two different names. *Jus* is law looked at from the point of view of right and justice; *lex* is law looked at from the point of view of authority and force. *Jus* is the rule of right which becomes law by its authoritative establishment; *lex* is the authority by virtue of which the rule of right becomes law. Law is *jus* in respect of its *contents*, namely, the rule of right; it is *lex* in respect of its *source*, namely, its recognition and enforcement by the state. We see, then, how it is that so many words for law mean justice also; since justice is the content or subject-matter of law, and from this subject-matter law derives its title. We understand also how it is that so many words for law do not also mean justice; law has another side and aspect from which it appears, not as justice realised and established, but as the instrument through which its realisation and establishment are effected.

A priori we may presume that in the case of those terms which possess a double application, both ethical and legal, the ethical is historically prior, and the legal later and derivative. We may assume that justice comes to mean law, not that law comes to mean justice. This is the logical order, and is presumably the historical order also. As a matter of fact this presumption is, as we shall see, correct in the case of all modern terms possessing the double signification. In the case of *recht*, *droit*, *diritto*, *equity*, the ethical sense is undoubtedly primary, and the legal secondary. In respect of the corresponding Greek and Latin terms (*jus*, *δίκαιον*) the data would seem insufficient for any confident conclusion. The reverse order of development is perfectly possible; there is no reason why lawful should not come to mean in a secondary sense rightful, though a transition in the opposite direction is more common and more natural. The significant fact is the union of the two meanings in the same word, not the order of development.

A second distinction between *jus* and *lex* is that the former is usually *abstract*, the second *concrete* (*a*). The English term law indeed combines both these uses in itself. In its abstract application we speak of the law of England, criminal law, courts of law. In its concrete sense, we say that Parliament has enacted or repealed a law. In foreign languages, on the other hand, this union of the two significations is unusual. *Jus*, *droit*, *recht* mean law in the abstract, not in the concrete. *Lex*, *loi*, *gesetz* signify, at least primarily and normally, a legal enactment, or a rule established by way of enact-

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(*a*) *Supra*, § 14.

ment, not law in the abstract. This, however, is not invariably the case. *Lex, loi,* and some other terms belonging to the same group have undoubtedly acquired a secondary and abstract signification in addition to their primary and concrete one. In medieval usage the law of the land is *lex terrae,* and the law of England is *lex et consuetudo Angliae.* So in modern French *loi* is often merely an equivalent for *droit.* We cannot therefore regard the second distinction between *jus* and *lex* as essential. It is closely connected with the first, but, though natural and normal, it is not invariable. The characteristic difference between English and foreign usage is not that our *law* combines the abstract and concrete significations (for so also do certain Continental terms), but that the English language contains no generic term which combines ethical and legal meanings as do *jus, droit,* and *recht.*

RECHT, DROIT, DIRITTO.—These three terms are all closely connected with each other and with the English *right.* The French and Italian words are derivatives of the Latin *directus* and *rectus,* these being cognate with *recht* and *right.* We may with some confidence assume the following order of development among the various ideas represented by this group of expressions:—

1. The original meaning was in all probability *physical straightness.* This use is still retained in our *right* angle and *direct.* The root is RAG, to stretch or straighten. The group of connected terms ruler, *rex, rajah,* regulate, and others, would seem to be independently derived from the same root, but not to be in the same line of development as right and its synonyms. The ruler or regulator is he who keeps things straight or keeps order, not he who establishes the right. Nor is the right that which is established by a ruler.

2. In a second and derivative sense the terms are used metaphorically to indicate moral approval—ethical rightness, not physical. Moral disapproval is similarly expressed by the metaphorical expressions wrong and tort, that is to say, crooked or twisted. These are metaphors that still commend themselves; for the honest man is still the straight and upright man, and the ways of wickedness are still crooked. In this sense, therefore, *recht, droit,* and *diritto* signify justice and right.

3. The first application being physical and the second ethical, the third is juridical. The transition from the second to the third is easy. Law is justice as recognised and protected by the state. The rules of law are the rules of right, as authoritatively established and enforced by tribunals appointed to that end. What more natural, therefore, than for the ethical terms to acquire derivatively a juridical application? At this point, however, our modern English *right* has parted company with its Continental relatives. It has remained physical and ethical, being excluded from the juridical sphere by the superior convenience of the English *law.*

4. The fourth and last use of the terms we are considering may be regarded as derivative of both the second and third. It is that in which we speak of *rights,* namely, claims, powers, or other advantages

conferred or recognised by the rule of right or the rule of law. That a debtor should pay his debt to his creditor is not merely right, it is *the* right of the creditor. Right is *his* right for whose benefit it exists. So, also, wrong is *the* wrong of him who is injured by it. The Germans distinguish this use of the term by the expression *subjectives Recht* (right as vested in a subject) as opposed to *objectives Recht*, namely, the rule of justice or of law as it exists objectively. The English *right* has been extended to cover legal as well as ethical *claims*, though it has, as we have seen, been confined to ethical *rules*.

A.-S. RIHT.—It is worthy of notice that the Anglo-Saxon *riht*, the progenitor of our modern *right*, possessed like its Continental relatives the legal in addition to the ethical meaning. The common law is *folc-riht* (*b*). The divine law is *godes riht* (*c*). A plaintiff claims property as "his by *folc-riht*" (*d*), even as a Roman would have claimed it as being *dominus ex jure Quiritium*. The usage, however, did not prosper. It had to face the formidable and ultimately successful rivalry of the English (originally Danish) *law*, and even Norman-French, on its introduction into England, fell under the same influence. For a time, indeed, in the earlier books we find both *droit* and *ley* as competing synonyms (*e*), but the issue was never doubtful. The archaism of "common right" as a synonym for "common law" is the sole relic left in England of a usage universal in Continental languages.

EQUITY.—The English term equity has pursued the same course of development as the German *recht* and the French *droit*.

1. Its primitive meaning, if we trace the word back to its Latin source, *aequum*, is physical equality or evenness, just as physical straightness is the earliest meaning of right and its analogues.

2. Its secondary sense is ethical. Just as rightness is straightness, so equity is equality. In each case there is an easy and obvious metaphorical transition from the physical to the moral idea. Equity therefore is justice.

3. In a third and later stage of its development the word takes on a juridical significance. It comes to mean a particular portion of the civil law—that part, namely, which was developed by and administered in the Court of Chancery. Like *recht* and *droit* it passed from the sense of justice in itself to that of the rules in accordance with which justice is administered.

4. Fourthly and lastly we have to notice a legal and technical use of the term equity, as meaning any claim or advantage recognised or

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(*b*) Thorpe, Ancient Laws and Institutes of England, i. 159; Laws of King Edward, pr.

(*c*) *Ibid.* i. 171; Laws of Edward and Guthrum, 6.

(*d*) *Ibid.* i. 181; Oaths, 3.

(*e*) See *e.g.*, Mirror of Justices (Selden Society's Publications, vol. vii.), *passim*.

conferred by a rule of equity, just as a right signifies any claim or advantage derived from a rule of right. An equity is an equitable, as opposed to a legal right. "When the equities are equal," so runs the maxim of Chancery, "the law prevails." So a debt is assignable "subject to equities."

JUS.—We have to distinguish in the case of *jus* the same three uses that have already been noticed in the case of *recht*, *droit*, and equity.

1. Right or Justice. "*Id quod semper aequum ac bonum est jus dicitur,*" says Paulus (*f*). From *jus* in this sense are derived *justitia* and *justum*.

2. Law. This is the most usual application of the term, the juridical sense having a much greater predominance over the ethical in the case of *jus*, than in that of its modern representatives *recht* and *droit*. *Jus*, in its ethical signification, is distinguished as *jus naturale*, and in its legal sense as *jus civile*. It is often contrasted with *fas*, the one being human and the other divine law. *Jus*, however, is also used in a wider sense to include both of these—*jus divinum et humanum*.

3. A right, moral or legal: *jus suum cuique tribuere* (*g*).

The origin and primary signification of *jus* are uncertain. It is generally agreed, however, that the old derivation from *jussum* and *jubere* is not merely incorrect, but an actual reversal of the true order of terms and ideas. *Jussum* is a derivative of *jus*. *Jubere* is, in its proper and original sense, to declare, hold, or establish anything as *jus*. It was the recognised expression for the legitimate action of the Roman people. *Legem jubere* is to give to a statute (*lex*) the force of law (*jus*). Only in a secondary and derivative sense is *jubere* equivalent to *imperare*.

The most probable opinion is that *jus* is derived from the Aryan root YU, to join together (a root which appears also in *jugem*, *jungo*, and in the English *yoke*). It has been suggested accordingly that *jus* in its original sense means that which is fitting, applicable, or suitable. If this is so, there is a striking correspondence between the history of the Latin term and that of the modern words already considered by us, the primary sense in all cases being physical, the ethical sense being a metaphorical derivative of this, and the legal application coming last. The transition from the physical to the ethical sense in the case of the English *fit* and *fitting* is instructive in this connexion. Another suggestion, however, is that *jus* means primarily that which is *binding*—the bond of moral and subsequently

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(*f*) D. 1. 1. 11.

(*g*) *Jus* is also used in various other derivative senses of less importance: *e.g.* a law court (*in jus vocare*), legal or rightful power or authority (*sui juris esse: jus et imperium*), legal decision, judgment (*jura dicere*). See Nettleship, Contributions to Latin Lexicography, sub voc. *Jus*.

of legal obligation. But no definite conclusion on this matter is possible (*h*).

Δίκη. τό δίκαιον.—The Greek term which most nearly corresponds to the Latin *jus* is *δίκη*. These words cannot, however, be regarded as synonymous. The juridical use of *jus* is much more direct and predominant than the corresponding use of *δίκη*. Indeed, we may say of the Greek term that it possesses juridical implications, rather than applications. Its chief uses are the following, the connexion between them being obvious: (1) custom, usage, way; (2) right, justice; (3) law, or at least legal right; (4) judgment; (5) a lawsuit; (6) a penalty; (7) a court of law. The primary sense is said to be that first mentioned, viz. custom. The transition is easy from the idea of the customary to that of the right, and from the idea of the right to that of the lawful. In the case of the Latin *mos* we may trace an imperfect and tentative development in the same direction (*i*). Professor Clark, on the other hand, prefers to regard judgment as the earliest meaning of *δίκη*, the other ethical and legal applications being derivatives from this, and *δίκη* in the sense of custom being an independent formation from the original root (*k*). Such an order of development seems difficult and unnatural. Analogy and the connexion of ideas seem to render more probable the order previously suggested, viz. custom, right, law, and finally the remaining legal uses (*l*).

Θέμις Θέμιστες.—As *δίκη* corresponds to *jus*, so *θέμις* apparently corresponds to *fas*. While *fas*, however, preserved its original signification as that which is right by divine ordinance, and never acquired any secondary legal applications or implications, the Greek term proved more flexible, and consequently has to be reckoned with in the present connexion. The matter is one of very considerable difficulty, and no certain conclusions seem possible, but the following order of development would seem to commend itself as the most probable:—

1. Θέμις, divine ordinance, the will of the gods. The term is

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(*h*) See Clark, Practical Jurisprudence, p. 18; Skeat's Etymological English Dictionary, sub voc. *just*; Manuel des Antiquités Romaines, vol. 6, part i. p. 352, note 4; Miller's Data of Jurisprudence, p. 33.

(*i*) Nettleship, Contributions to Latin Lexicography, sub voc. *Mos*.

(*k*) Practical Jurisprudence, p. 51.

(*l*) *Dike* is said to be derived from DIK, to show, point out, make known, this being itself a form of DA, to know: hence, practical knowledge, skill, the *way a thing is done, custom*. This suggestion might be considered ingenious, rather than convincing, were it not for the singular fact that the Teutonic languages exhibit a precisely similar process of thought. The English substantive *wise* means way or manner, and is yet the same word as *wise*, the adjective, and is derived from the root WID, to know. So also with the German *Weise* (way), *weisen* (to point out, direct), *weise* (wise). See Curtius, Grundzüge der Griechischen Etymologie, sub voc. *dike*. Skeat, sub voc. Wise, and list of Aryan Roots, 145 and 372.

derived from the Aryan root DHA, to set, place, appoint, or establish, which appears also in θεσμός, a statute or ordinance (*m*). This latter term, however, included *human* enactments, while θέμις was never so used. The Greek term is cognate with *thesis* and *theme*, and with our English *doom*, a word whose early legal uses we shall consider later.

2. Θέμις, right. The transition is easy from that which is decreed and willed by the gods, to that which it is right for mortal men to do.

3. Θέμιστες, the rules of right, whether moral or legal, so far as any such distinction was recognised in that early stage of thought to which these linguistic usages belong.

4. Θέμιστες, judgments, judicial declarations of the rules of right and law (*n*).

LEX.—So far we have dealt solely with those words which belong to the class of *jus*, namely, those which possess a double signification, ethical and legal. We proceed now to the consideration of the second class, represented by *lex*. And first of *lex* itself. The following are its various uses given in what is probably the historical order of their establishment.

1. Proposals, terms, conditions, offers made by one party and accepted by another (*o*). Thus, *ea lege ut* (*p*), on condition that; *dicta tibi est lex* (*p*), you know the conditions; *his legibus* (*p*), on these conditions. So *legis pacis* (*p*) are the terms and conditions of peace: *pax data Philippo in has leges est* (*p*). Similarly in law, *leges locationis* are the terms and conditions agreed upon between lender and borrower. So we have the legal expressions *lex mancipii*, *lex commissoria*, and others.

2. A statute enacted by the *populus Romanus* in the *comitia centuriata* on the proposal of a magistrate. This would seem to be a specialised application of *lex* in the first-mentioned sense. Such a statute is conceived rather as an agreement than as a command. It is a proposal made by the consuls and accepted by the Roman people. It is therefore *lex*, even as a proposal of peace made and accepted between the victor and the vanquished is *lex*. "Lex," says Justinian, "est quod populus Romanus senatorio magistratu interrogante, veluti consule, constituebat" (*q*).

3. Any statute howsoever made—whether by way of authoritative imposition, or by way of agreement with a self-governing people.

(*m*) Skeat, Aryan Roots, 162.

(*n*) On the whole matter, see Maine, Ancient Law, ch. 1; Clark, Practical Jurisprudence, p. 42; Liddell and Scott, sub voc. *themis;* Hirzel, Themis Dike und Verwandtes (1907).

(*o*) Manuel des Antiquités Romaines, vol. 6, part i. p. 351; Nettleship, sub voc. *Lex*.

(*p*) Cited by Nettleship, sub voc. *Lex*.

(*q*) Just. Inst. i. 2. 4.

4. Any rule of action imposed or observed, e.g. *lex loquendi*, *lex sermonis*. This is simply an analogical extension similar to that which is familiar in respect of the corresponding terms in modern languages, *law*, *loi*, *gesetz*.

5. Law in the abstract sense. *Lex*, so used, cannot be regarded as classical Latin, although in certain instances, as in Cicero's references to *lex naturae*, we find what seems a very close approximation to it. In medieval Latin, however, the abstract signification is quite common, as in the phrases *lex Romana*, *lex terrae*, *lex communis*, *lex et consuetudo* (*r*). *Lex* has become equivalent to *jus* in its legal applications. This use is still retained in certain technical expressions of private international law, such as *lex fori*, *lex domicilii*, and others.

It is possible that we have here an explanation of the very curious fact that so celebrated and important a word as *jus* failed to maintain itself in the Romance languages. Of the two terms *jus* and *lex*, bequeathed to later times by the Latin language, one was accepted (*loi*=*lex*) and the other rejected and supplanted by a modern substitute (*droit*, *diritto*). Why was this? May it not have been owing to that post-classical use of *lex* in the abstract sense, whereby it became synonymous and co-extensive with *jus*? If *lex Romana* was *jus civile*, why should the growing languages of modern Europe cumber themselves with both terms? The survivor of the two rivals was *lex*. At a later stage the natural evolution of thought and speech conferred juridical uses on the ethical terms *droit* and *diritto* and the ancient duality of legal nomenclature was restored.

6. Judgment. This, like the last and like the three following uses, is a medieval addition to the meanings of *lex*. We have already seen the transition from law to judgment in the case of *jus*, δίκη, and θέμις. *Legem facere* is to obey or fulfil the requirements of a judgment. *Legem vadiare*, the English wager of law, is to give security for such obedience and fulfilment (*r*).

7. The penalty, proof, or other matter imposed or required by a judgment; *lex ignea*, the ordeal of fire; *lex duelli*, trial by battle (*s*).

8. Legal rights, regarded collectively as constituting a man's legal standing or status. *Legem amittere* (in English, to lose one's law) was in early English law an event analogous to the *capitis deminutio* and *infamia* of the Romans. It was a loss of legal status, a partial deprivation of legal rights and capacities (*t*).

Νόμος.—As δίκη corresponds to *jus* and θέμις to *fas*, so νόμος is the Greek equivalent of *lex*. We have to distinguish two uses of the term, one earlier and general, the other later and specialised.

(*r*) See Ducange, sub voc. *Lex*.

(*s*) *Ibid.*

(*t*) *Ibid.*

1. Νόμος is used in a very wide sense to include any human institution, anything established or received among men, whether by way of custom, opinion, convention, law or otherwise. It was contrasted, at least in the language of the philosophers, with φύσις, or nature. That which is natural is τὸ φυσικόν; that which is artificial, owing its origin to the art and invention of mankind, is τὸ νομικόν. It is often said that the earliest meaning of νόμος is custom. The original conception, however, seems to include not merely that which is established by long usage, but that which is established, received, ordained, or appointed in whatever fashion. Νόμος is *institutum*, rather than *consuetudo*.

Νόμος in a later, secondary, and specialised application, means a statute, ordinance, or law. So prominent among human institutions are the laws by which men are governed, so greatly with increasing political development do the spheres and influence of legislation extend themselves, that the νόμοι became in a special and pre-eminent sense the laws of the state. Νόμος was a word unknown to Homer, but it became in later times the leading juridical term of the Greek language. The Greeks spoke and wrote of the laws (νόμοι), while the Romans, perhaps with a truer legal insight, concerned themselves with the law (*jus*). When, like Cicero, they write *de legibus*, it is in imitation of Greek usage.

LAW.—Law is by no means the earliest legal term acquired by the English language. Curiously enough, indeed, it would seem not even to be indigenous, but to be one of those additions to Anglo-Saxon speech which are due to the Danish invasions and settlements. Of the earlier terms the commonest, and the most significant for our present purpose, is *dom*, the ancestor of our modern *doom* (*u*). A *dom* or *doom* is either (1), a law, ordinance, or statute or (2) a judgment. It does not seem possible to attribute with any confidence historical priority to either of these senses. In modern English the idea of judgment has completely prevailed over and excluded that of ordinance, but we find no such predominance of either meaning in Anglo-Saxon usage. The word has its source in the Aryan root DHA, to place, set, establish, appoint, and it is therefore equally applicable to the decree of the judge and to that of the lawgiver. In the laws of King Alfred we find the term in both its senses. "These are the dooms which Almighty God himself spake unto Moses and commanded him to keep" (*x*). "Judge then not one doom to the rich and another to the poor" (*y*). In the following passage of the laws of Edgar the laws of the Danes are plainly equivalent to the dooms of the English: "I will that secular right stand among the Danes

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(*u*) See Murray's New English Dictionary, sub voc. *Doom*.

(*x*) Thorpe, Ancient Laws and Institutes of England, vol. i. p. 55; Laws of King Alfred, sect. 49.

(*y*) *Ibid.* sect. 43.

with as good laws as they best may choose. But with the English let that stand which I and my Witan have added to the dooms of my forefathers" (z).

Doom is plainly cognate to θέμις. The religious implication, however, which, in the Greek term, is general and essential, is, in the English term, special and accidental. In modern English doom is, like θέμις, the will, decree and judgment of Heaven—fate or destiny; but the Anglo-Saxon *dom* included the ordinances and judgments of mortal men, no less than those of the gods. Θέμις, therefore, acquired the sense of human law only derivatively through the sense of right, and so belongs to the class of *jus*, not of *lex*; while doom, like θέσμός, acquired juridical applications directly, and so stands besides *lex* and νόμος.

Dom, together with all the other Anglo-Saxon legal terms, including, strangely enough, *right* itself, was rapidly superseded by *lagu*, which is the modern *law*. The new term makes its appearance in the tenth century, and the passage cited above from the laws of King Edgar is one of the earliest instances of its use. *Lagu* and law are derived from the root LAGH, to lay, settle, or place. Law is that which is laid down. There is a considerable conflict of opinion as to whether it is identical in origin with the Latin *lex* (*leg*-). Schmidt and others decide in the affirmative (*a*), and the probabilities of the case seem to favour this opinion. The resemblance between law and *lex* seems too close to be accidental. If this is so, the origin of *lex* is to be found in the Latin *lego*, not in its later sense of reading, but in its original sense of laying down or setting (as in the derivative *lectus*), which is also the primary signification of the Greek λέγω, the German *legen*, and the English *lay* (*b*). If this is so, then law and *lex* are alike that which is laid down, just as *Gesetz* is that which is set (*setzen*). This interpretation is quite consistent with the original possession by *lex* of a wider meaning than statute, as already explained. We still speak of laying down terms, conditions and propositions, no less than of laying down commands, rules and laws. *Lex*, however, is otherwise and variously derived from or connected with *ligare*, to bind (*c*), *legere*, to read (*d*), and λέγειν, to say or speak (*e*).

It is true indeed that by several good authorities it is held that the original meaning of *lagu* and law is that which lies, not that

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(*z*) Thorpe, vol. i. p. 273; Laws of King Edgar, Supplement, sect. 2. In Scottish legal procedure the word doom is still used in the sense of judgment; the death sentence is "pronounced for doom": Miller's Data of Jurisprudence, p. 292.

(*a*) Manuel des Antiquités Romaines, vol. 6, pt. i. p. 351, n.

(*b*) See Smith's Latin Dictionary, sub voc. *lego*.

(*c*) Nettleship, sub voc. *Lex*.

(*d*) Clark, p. 31.

(*e*) Muirhead, Historical Introduction to the Private Law of Rome, p. 19.

which has been laid or settled—that which is customary, not that which is established by authority (*f*). The root LAGH, however, must contain both the transitive and intransitive senses, and I do not know what evidence there is for the exclusion of the former from the signification of the derivative *law*. Moreover, there seems no ground for attributing to *lagu* the meaning of custom. It seems from the first to have meant the product of authority, not that of use and wont. It is *statutum*, not *consuetudo*. As soon as we meet with it, it is equivalent to *dom*. The analogy also of *lex*, *gesetz*, *dom*, *θεσμός*, and other similar terms is in favour of the interpretation here preferred (*g*).

(*f*) Skeat, sub voc. Law; Clark, p. 68.

(*g*) Much information as to the etymology and early meanings of legal terms is to be found in Miller's Data of Jurisprudence, *passim*. See also Walker's Science of International Law, pp. 21—25.

APPENDIX II.

THE THEORY OF SOVEREIGNTY.

In discussing the legal theory of the state, we noticed the distinction between sovereign and subordinate power (*a*). The former is that which, within its own sphere, is conceived of as absolute and uncontrolled, while the latter is that which is subject to the control of some power superior and external to itself. We have now to consider in relation to this distinction a celebrated doctrine which we may term Hobbes's political theory of sovereignty. It was not, indeed, originated by the English philosopher, but is due rather to the celebrated French publicist Bodin, from whom it first received definite recognition as a central element of political doctrine. In the writings of Hobbes, however, it assumes greater prominence and receives more vigorous and clear-cut expression, and it is to his advocacy and to that of his modern followers that its reception in England must be chiefly attributed.

The political theory in question may be reduced to three fundamental propositions:—

1. **That sovereign power is essential in every state;**
2. **That sovereign power is indivisible;**
3. **That sovereign power is unlimited and illimitable.**

The first of these propositions may be accepted as correct, but the second and third would seem to have no solid foundation. The matter, however, is one of very considerable obscurity and complexity, and demands careful consideration.

1. *Sovereignty essential.* It seems clear that in legal theory every political society involves the presence of supreme power. For otherwise all power would be subordinate, and this supposition involves the absurdity of a series of superiors and inferiors *ad infinitum*. Yet although this is so, there is nothing to prevent the sovereignty which is thus essential from being wholly or partly *external* to the state. It is, indeed, only in the case of those states which are both independent and fully sovereign that the sovereignty is wholly internal, no part of it being held or exercised *ab extra* by any other authority. When a state is dependent, that is to say, merely a separately organised portion of a larger body politic, the sovereign power is

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(*a*) *Supra*, § 41.

vested wholly or in part in the larger unity, and not in the dependency itself. Similarly when a state, though independent, is only semi-sovereign, its autonomy is impaired through the possession and exercise of a partial sovereignty by the superior state. In all cases, therefore, sovereign power is necessarily present somewhere, but it is not in all cases to be found in its entirety within the borders of the state itself.

2. *Indivisible sovereignty.*—Every state, it is said, necessarily involves not merely sovereignty, but a *sovereign*, that is to say, one person or one body of persons in whom the totality of sovereign power is vested. Such power, it is said, cannot be shared between two or more persons. It is not denied that the single supreme body may be composite, as the English Parliament is. But it is alleged that whenever there are in this way two or more bodies of persons in whom sovereign power is vested, they necessarily possess it as joint tenants of the whole, and cannot possess it as tenants in severalty of different parts. The whole sovereignty may be in A., or the whole of it in B., or the whole of it in A. and B. jointly, but it is impossible that part of it should be in A. and the residue in B.

We may test this doctrine by applying it to the British constitution. We shall find that this constitution in no way conforms to the principles of Hobbes on this point, but is on the contrary a clear instance of divided sovereignty. The *legislative* sovereignty resides in the Crown and the two Houses of Parliament, but the *executive sovereignty* resides in the Crown by itself, the Houses of Parliament having no share in it. It will be understood that we are here dealing exclusively with the law or legal theory of the constitution. The practice is doubtless different; for in practice the House of Commons has obtained complete control over the executive government. In practice the ministers are the servants of the legislature and responsible to it. In law they are the servants of the Crown, through whom the Crown exercises that sovereign executive power which is vested in it by law, independently of the legislature altogether.

In law, then, the executive power of the Crown is sovereign, being absolute and uncontrolled within its own sphere. This sphere is not indeed legally unlimited. There are many things which the Crown cannot do; it cannot pass laws or impose taxes. But what it can do it does with sovereign power. By no other authority in the state can its powers be limited, or the exercise of them controlled, or the operation of them annulled. It may be objected by the advocates of the theory in question that the executive is under the control of the legislature, and that the sum-total of sovereign power is therefore vested in the latter, and is not divided between it and the executive. The reply is that the Crown is not merely itself a part of the legislature, but a part without whose consent the legislature cannot exercise any fragment of its own power. No law passed by the two Houses of

Parliament is operative unless the Crown consents to it. How, then, can the legislature control the executive? Can a man be subject to himself? A power over a person, which cannot be exercised without that person's consent, is no power over him at all. A person is subordinate to a body of which he is himself a member, only if that body has power to act notwithstanding his dissent. A dissenting minority, for example, may be subordinate to the whole assembly. But this is not the position of the Crown.

The English constitution, therefore, recognises a sovereign executive, no less than a sovereign legislature. Each is supreme within its own sphere; and the two authorities are kept from conflict by the fact that the executive is one member of the composite legislature. The supreme legislative power is possessed jointly by the Crown and the two Houses of Parliament, but the supreme executive power is held in severalty by the Crown. When there is no Parliament, that is to say, in the interval between the dissolution of one Parliament and the election of another, the supreme legislative power is in abeyance, but the supreme executive power is retained unimpaired by the Crown (*b*).

This is not all, however, for, until the passing of the Parliament Act, 1911, the British constitution recognised a supreme judicature, as well as a supreme legislature and executive. The House of Lords in its judicial capacity as a court of final appeal was sovereign. Its judgments were subject to no further appeal, and its acts were subject to no control. What it declared for law no other authority known to the constitution could dispute. Without its own consent its judicial powers could not be impaired or controlled, nor could their operation be annulled. The consent of this sovereign judicature was no less essential to legislation, than was the consent of the sovereign executive. The House of Lords, therefore, held in severalty the supreme judicial power, while it shared the supreme legislative power with the Crown and the House of Commons (*c*).

3. *Illimitable sovereignty.* Sovereign power is declared by the political theory in question to be not merely essential and indivisible, but also illimitable. Not only is it uncontrolled within its own province, but that province is infinite in extent. "It appeareth plainly to my understanding," says Hobbes (*d*), "both from reason

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(*b*) As to the severance of legislative and executive sovereignty in the British constitution, see Anson, Law and Custom of the Constitution, Part I. pp. 39—41, 3rd ed.

(*c*) As to the divisibility of sovereign power, see Bryce's Studies in History and Jurisprudence, II. p. 70: "Legal sovereignty is divisible, *i.e.*, different branches of it may be concurrently vested in different persons or bodies, co-ordinate altogether, or co-ordinate partially only, though acting in different spheres." For a statement of the contrary opinion see Brown, Austinian Theory of Law, p. 174.

(*d*) Leviathan, ch. 20, Eng. Works, III. 194.

and Scripture, that the sovereign power, whether placed in one man, as in monarchy, or in one assembly of men, as in popular and aristocratical commonwealths, is as great as possibly men can be imagined to make it. . . . And whosoever, thinking sovereign power too great, will seek to make it less, must subject himself to the power that can limit it; that is to say, to a greater." So Austin (*e*): "It follows from the essential difference of a positive law and from the nature of sovereignty and independent political society, that the power of a monarch properly so called or the power of a sovereign number in its collegiate and sovereign capacity, is incapable of legal limitation. . . . Supreme power limited by positive law is a flat contradiction in terms."

This argument confounds the limitation of power with the subordination of it. That sovereignty cannot within its own sphere be subject to any control is self-evident, for it follows from the very definition of this species of power. But that this sphere is necessarily universal is a totally different proposition, and one which cannot be supported. It does not follow that if a man is free from the constraint of any one stronger than himself, his physical power is therefore infinite.

In considering this matter we must distinguish between power in fact and power in law. For here as elsewhere that which is true in law may not be true in fact, and *vice versa*. A limitation of *de facto* sovereign power may not be also a limitation of *de jure* sovereignty, and conversely the legal theory of the constitution may recognise limitations which are non-existent in fact (*f*).

That *de facto* sovereign power may be, and indeed necessarily is, limited is sufficiently clear. Great as is the power of the government of a modern and civilised state, there are many things which it not merely ought not to do, but cannot do. They are in the strictest sense of the term beyond its *de facto* competence. For the effective power of a sovereign depends on and is measured by two things: first, the physical force which he has at his command, and which is the essential instrument of his government; and second, the disposition of the members of the body politic to submit to the exercise of this force against themselves. Neither of these two things is unlimited in extent, therefore the *de facto* sovereignty which is based upon them is not unlimited either. This is clearly recognised by Bentham (*g*). "In this mode of limitation," he says, "I see not what there is that need surprise us. By what is it that any degree of power (meaning political power) is established? It is neither more nor less . . . than

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(*e*) I. 270.

(*f*) The distinction between *de jure* or legal and *de facto* or practical sovereignty—sovereign power in law and sovereign power in fact—is admirably expressed and analysed in Bryce's Studies in History and Jurisprudence, II. pp. 49—73.

(*g*) Fragment on Government, ch. 4, sects. 35, 36.

a habit of and a disposition to obedience. . . . This disposition it is as easy, or I am much mistaken, to conceive as being absent with regard to one sort of acts, as present with regard to another. For a body, then, which is in other respects supreme, to be conceived as being with respect to a certain sort of acts limited, all that is necessary is that this sort of acts be in its description distinguishable from every other. . . . These bounds the supreme body in question has marked out to its authority: of such a demarcation, then, what is the effect? Either none at all, or this: that the disposition to obedience confines itself within these bounds. Beyond them the disposition is stopped from extending; beyond them the subject is no more prepared to obey the governing body of his own state than that of any other. What difficulty, I say, there should be in conceiving a state of things to subsist, in which the supreme authority is thus limited—what greater difficulty in conceiving it with this limitation, than without any, I cannot see. The two states are, I must confess, to me alike conceivable: whether alike expedient, alike conducive to the happiness of the people, is another question."

The follower of Hobbes may admit the limitation of *de facto*, but deny that of *de jure* sovereign power. He may contend that even if there are many things which the sovereign has no power to do in fact, there is and can be nothing whatever which he has no power to do in law. The law, he may say, can recognise no limitations in that sovereign power from which the law itself proceeds.

In reply to this it is to be observed that the law is merely the theory of things as received and operative within courts of justice. It is the reflection and image of the outer world seen and accepted as authentic by the tribunals of the state. This being so, whatever is possible in fact is possible in law, and more also. Whatsoever limitations of *de facto* sovereign power may exist may be reflected in and recognised by the law. To allow that limitations of *de facto* sovereignty are possible is to allow the possibility of corresponding limitations of sovereignty *de jure*. If the courts of justice habitually act upon the principle that certain functions or forms of activity do not, according to the constitution, pertain to any organ in the body politic, and therefore lie outside the scope of legal sovereign power as recognised by the constitution, then that principle is by virtue of its judicial application a true principle of law, and sovereign power is limited in law no less than in fact.

The contrary view is based on that unduly narrow view of the nature of law which identifies it with the command of the sovereign issued to his subjects. In this view, law and legal obligation are co-extensive, and the limitation of legal supreme power appears to involve the subjection of the possessor of it to legal obligations in respect to the exercise of it. This, of course, conflicts with the very definition of sovereign legal power, and is clearly impossible (*h*). That sovereign power may be legally controlled within its own province is a self-contradictory proposition; that its province may have legally appointed bounds is a distinct and valid principle.

There is one application of the doctrine of illimitable sovereignty which is of sufficient importance and interest to deserve special notice. Among the chief functions of sovereign power is legislation. It follows from the theory in question, that in every political society there necessarily exists some single authority possessed of unlimited legislative power. This power is, indeed, alleged to be the infallible test of sovereignty. In seeking for that sovereign who, according to the political doctrine of Hobbes, is to be found somewhere in every body politic, all that is necessary is to discover the person who posseses the power of making and repealing all laws without exception. He and he alone is the sovereign of the state, for he necessarily has legal power over all, and in all, and subject to none.

As to this it is to be observed, that the extent of legislative power depends on and is measured by the recognition accorded to it by the tribunals of the state. Any enactment which the law-courts decline to recognise and apply is by that very fact *not law*, and lies beyond the legal competence of the body whose enactment it is. And this is so, whether the enactment proceeds from a borough council or from the supreme legislature. As the law of England actually stands, there are no legal limitations on the legislative power of the Imperial Parliament. No statute passed by it can be rejected as *ultra vires* by any court of law. This legal rule of legislative omnipotence may be wise or it may not; but it is difficult to see by what process of reasoning the jurist can demonstrate that it is theoretically necessary.

At no very remote period it was considered to be the law of England, that a statute made by Parliament was void if contrary to reason and the law of God (*i*). The rule has now been abandoned by the courts, but it seems sufficiently obvious that its recognition involves no theoretical absurdity or impossibility, however inexpedient it may be. Yet it clearly involves the limitation of the power of the legislature by a rule of law. To take another example, the most striking illustration of the legislative omnipotence of the English Parliament is its admitted power of extending the term for which an existing House of Commons has been elected. Delegates appointed by the people for a fixed time have the legal power of extending the period of their own delegated authority. It is difficult to see any theoretical objection to a rule of the opposite import. Why should not the courts of law recognise and apply the principle

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(*h*) We have already seen that the state may and does owe legal duties to its subjects, but that these duties are necessarily imperfect and unenforceable. *Supra*, § 79.

(*i*) For authorities, see § 67.

that an existing Parliament is sovereign only during the limited time for which it was originally appointed, and is destitute of any power of extending that time? And in such a case would not the authority of the supreme legislature be limited by a rule of law?

The exercise of legislative power is admittedly subject to legal *conditions*; why not, then, to legal *limitations*? If the law can regulate the *manner* of the exercise of legislative power, why not also its *matter*? As the law stands, Parliament may repeal a statute in the same session and in the same manner in which it was passed. What, then, would be the effect of a statute providing that no statute should be repealed save by an absolute majority in both Houses? Would it not create good law, and so prevent either itself or any other statute from being repealed save in manner so provided? What if it is provided further, that no statute shall be repealed until after ten years from the date of its enactment? Is such a statutory provision void? And if valid, will it not be applied by the law-courts, so that any attempt to repeal either it or any other statute less than ten years old will be disregarded, as beyond the competence of Parliament? And if a statute can be made unrepealable for ten years, how is it *legally impossible* that it should be made unrepealable for ever? Such a rule may be very unwise, but by what argument are we to prove that it involves a logical absurdity?

In respect of its legislative omnipotence the English Parliament is almost unique in modern times. Most modern constitutions impose more or less stringent limitations upon the powers of the legislature. In the United States of America neither Congress nor any State Legislature possesses unrestricted powers. They cannot alter the constitutions by which they have been established, and those constitutions expressly withdraw certain matters from their jurisdiction. Where, then, is the sovereignty vested? The reply made is that these constitutions contain provisions for their alteration by some other authority than the ordinary legislature, and that the missing legislative power is therefore to be found in that body to which the right of altering the constitution has been thus entrusted. In the United States the sovereignty, it is said, is vested not in Congress, but in a majority of three-fourths of the State Legislatures; this composite body has absolute power to alter the constitution, and is therefore unbound by any of the provisions of it, and is so possessed of unlimited legislative power.

Now, whenever the constitution has thus entrusted absolute powers of amendment to some authority other than the ordinary legislature, this is a perfectly valid reply. But what shall we say of a constitution which, while it prohibits alteration by the ordinary legislature, provides no other method of effecting constitutional amendments? There is no logical impossibilty in such a constitution, yet it would be clearly unalterable in law. That it would be amended in defiance of the law cannot be doubted, for a constitution which will not bend will sooner or later break. But all questions as to civil and supreme legal power are questions as to what is possible within, not without, the limits of the constitution. If there is no constitution which meets with due observance, there is no body politic, and the theory of political government is deprived of any subject-matter to which it can apply. The necessary *datum* of all problems relating to sovereignty is the existence and observance of a definite scheme of organised structure and operation, and it is with this *datum* and presupposition that we must discuss the question of the extent of legislative power.

Even where a constitution is not wholly, it may be partly unchangeable in law. Certain portions of it may on their original establishment be declared permanent and fundamental, beyond the reach even of the authority to which in other respects the amendment of the constitution is entrusted. Article V. of the Constitution of the United States of America provides that no state shall be deprived of its equal suffrage in the Senate without its own consent. Having regard to this provision, what body is there in the United States which has vested in it unlimited legislative power? The same Article provides that certain portions of the Constitution shall be unalterable until the year 1808. What became of sovereign power in the meantime? (*k*) (*l*).

(*k*) As to the possibility of legal limitations of legal sovereign power, see Jellinek, Das Recht des modernen Staates, I. pp. 432—441; Pollock, Jurisprudence, pp. 270—273, 2nd ed.; Sidgwick, Elements of Politics, pp. 23—29, 623—638; Bryce, Studies in History and Jurisprudence, II. 71. "Legal sovereignty," says Lord Bryce, "may be limited, *i.e.*, the law of any given state may not have allotted to any one person or body, or to all the persons or bodies taken together, who enjoys or enjoy supreme legislative or executive power, the right to legislate or to issue special orders on every subject whatever." Brown, Austinian Theory of Law, pp. 158—164.

(*l*) If the student, after reading Sir John Salmond's seemingly unanswerable refutation of the Hobbesian view of sovereignty, should feel puzzled that so readily assailable a thesis should not have been stifled at birth, he will do well to remember that the theory in question was first propounded in days when analytical jurisprudence had not yet arisen to differentiate between the law or legal theory of the constitution, and those forms of political theory whose office it is, not to enlighten the student of law, but to indoctrinate the lay mind with assumptions favourable to the maintenance of one form rather than any other of political organisation. The fact that it should still, after three centuries, be found expedient to demonstrate so elaborately the unscientific character of Hobbes's propaganda, only serves to render more strikingly evident what effective propaganda it was.

APPENDIX III.

THE MAXIMS OF THE LAW.

Legal maxims are the proverbs of the law. They have the same merits and defects as other proverbs, being brief and pithy statements of partial truths. They express general principles without the necessary qualifications and exceptions, and they are therefore much too absolute to be taken as trustworthy guides to the law. Yet they are not without their uses. False and misleading when literally read, these established formulae provide useful means for the expression of leading doctrines of the law in a form which is at the same time brief and intelligible. They constitute a species of legal shorthand, useful to the lawyer, but dangerous to any one else; for they can be read only in the light of expert knowledge of that law of which they are the elliptical expression.

The language of legal maxims is almost invariably Latin, for they are commonly derived from the civil law, either literally or by adaptation, and most of those which are not to be found in the Roman sources are the invention of medieval jurists. The following is a list of the more familiar and important of them, together with brief comments and references.

1. Actus non facit reum nisi mens sit rea.

Leges Henrici Primi, V. 28. (Thorpe's Ancient Laws and Institutes of England, I. 511.) Coke's Third Institute, f. 6.

The act alone does not make the doer of it guilty, unless it is done with a guilty mind. Material without formal wrongdoing is not a ground of liability. The presence either of wrongful intent or of culpable negligence is a necessary condition of responsibility. See §§ 127, 132, 145.

2. Adversus extraneos vitiosa possessio prodesse solet.

D. 41. 2. 53.

Prior possession is a good title of ownership against all who cannot show a better. In the civil law, however, from which this maxim is derived, it has a more special application, and relates to the conditions of possessory remedies. See § 161.

3. Apices juris non sunt jura.

10 Co. Rep. 126. *Cf.* D. 17. 1. 29. 4: Non congruit de apicibus juris disputare.

Legal principles must not be carried to their most extreme consequences, regardless of equity and good sense. A principle valid within certain limits becomes false when applied beyond these limits. The law must avoid the falsehood of extremes.

4. CESSANTE RATIONE LEGIS CESSAT LEX IPSA.

In the application of this maxim to English law we must distinguish between common and statute law.

(1) *Common law.* A legal principle must, it is said, be read in the light of the reason for which it was established. It must not be carried further than this reason warrants, and where the *ratio legis* wholly fails, the principle will no longer apply (*a*).

(2) *Statute law.* To statute law the maxim has only a limited application, for such law depends upon the authority of the *litera legis.* It is only when the letter of the law is imperfect, that recourse may be had to the reason of it as a guide to its due interpretation. The maxim in question, therefore, is valid only as a rule of restrictive interpretation. The complementary rule of extensive interpretation is, Ubi eadem ratio ibi idem jus. See Vangerow, I. sect. 25.

5. COGITATIONIS POENAM NEMO PATITUR.

D. 48. 19. 18.

The thoughts and intents of men are not punishable. The law takes notice only of the overt and external act. In exceptional cases, however, the opposite maxim is applicable: Voluntas reputatur pro facto—The law takes the will for the deed. See § 137.

6. COMMUNIS ERROR FACIT JUS.

Coke's Fourth Inst. f. 240. *Cf.* D. 33. 10. 3. 5: Error jus facit.

A precedent, even though erroneous, will make valid law, if its authority has been so widely accepted and relied on that its reversal has become inexpedient in the interests of justice. See § 58.

7. CUIUS EST SOLUM EIUS EST USQUE AD COELUM.

Co. Litt. 4 a. 9 Co. Rep. 54. See § 155.

8. DE MINIMIS NON CURAT LEX.

Cro. Eliz. 353. *Cf.* the medieval maxim of the Civilians: Minima non curat praetor. Dernburg, Pandekten, I. § 140. n. 5.

The law takes no account of trifles. This is a maxim which relates to the ideal, rather than to the actual law. The tendency to

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(*a*) In so far, however, as it conflicts with the technical doctrine of precedent the maxim is an unsafe guide. Cf., *e.g.*, *Edwards* v. *Porter*, (1924) A. C., where a majority of the House of Lords seem not to have sympathised with the appeal made by Viscount Cave, L.C., to the maxim in question.

attribute undue importance to mere matters of form—the failure to distinguish adequately between the material and the immaterial—is a characteristic defect of legal systems.

9. EX NUDO PACTO NON ORITUR ACTIO.

Cf. D. 2. 14. 7. 4: Nuda pactio obligationem non parit. C. 4. 65. 27: Ex nudo pacto . . . actionem jure nostro nasci non potuisse.

In English law this maxim expresses the necessity of a legal consideration for the validity of a contract. *Nudum pactum* is *pactum sine causa promittendi.* In the civil law, however, the maxim means, on the contrary, that an agreement, to become binding, must fall within one of the recognised classes of legally valid contracts. There was no general principle that an agreement, as such, had the force of law. See § 124.

10. EX TURPI CAUSA NON ORITUR ACTIO.

Cf. D. 47. 2. 12. 1: Nemo de improbitate sua consequitur actionem.

An agreement contrary to law or morals can give rise to no right of action in any party to it, either for the enforcement of it, or for the recovery of property parted with in pursuance of it. *Cf.* the maxim: In pari delicto potior est conditio defendentis. See § 124.

11. IGNORANTIA FACTI EXCUSAT, IGNORANTIA JURIS NON EXCUSAT.

Cf. D. 22. 6. 9. pr. Regula est juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere. See §§ 146, 147.

12. IMPOSSIBILIUM NULLA OBLIGATIO EST.

D. 50. 17. 185.

Otherwise: Lex non cogit ad impossibilia. Impossibility is an excuse for the non-performance of an obligation—a rule of limited application.

13. IN JURE NON REMOTA CAUSA SED PROXIMA SPECTATUR.

Bacon's Maxims of the Law, 1.

A wrongdoer is not responsible for all the harmful consequences of his unlawful act. Liability exists only when the causal connection is regarded by the law as sufficiently direct. All other damage is said to be too remote.

14. IN PARI CAUSA POTIOR EST CONDITIO POSSIDENTIS.

Cf. D. 50. 17. 128. pr.: In pari causa possessor potior haberi debet. Also D. 20. 1. 10. D. 6. 2. 9. 4.

Possession and ownership—fact and right—enjoyment and title—are presumed by the law to be coincident. Every man may therefore keep what he has got, until and unless some one else can prove that he himself has a better title to it. See § 107.

15. IN PARI DELICTO POTIOR EST CONDITIO DEFENDENTIS.

Cf. D. 50. 17. 154: Cum par delictum est duorum, semper oneratur petitor.

Identical in effect with the maxim: Ex turpi causa non oritur actio.

16. INTER ARMA LEGES SILENT.

Cicero, Pro Milone, IV. 10.

This maxim has a double application: (1) As between the state and its external enemies, the laws are absolutely silent. No alien enemy has any claim to the protection of the laws or of the courts of justice. He is destitute of any legal standing before the law, and the government may do as it pleases with him and his. (2) Even as regards the rights of subjects and citizens, the ordinary law may be put to silence by *necessity* in times of civil disturbance. Necessitas non habet legem. Extrajudicial force may lawfully supersede the ordinary process and course of law, whenever it is needed for the protection of the state and the public order against illegal violence. See § 36.

17. INVITO BENEFICIUM NON DATUR.

D. 50. 17. 69.

The law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons, or disclaims a right will lose it. See § 122.

18. JURIS PRAECEPTA SUNT HAEC: HONESTE VIVERE, ALTERUM NON LAEDERE, SUUM CUIQUE TRIBUERE.

D. 1. 1. 10. 1. Just. Inst. 1. 1. 3.

"These are the precepts of the law: to live honestly, to hurt no one, and to give to every man his own." Attempts have been sometimes made to exhibit these three *praecepta juris* as based on a logical division of the sphere of legal obligation into three parts. This, however, is not the case. They are simply different modes of expressing the same thing, and each of them is wide enough to cover the whole field of legal duty. The third of them, indeed, is simply a variant of the received definition of justice itself: Justitia est constans et perpetua voluntas jus suum cuique tribuendi. D. 1. 1. 10. pr. Just. Inst. 1. 1. 1.

19. JUS PUBLICUM PRIVATORUM PACTIS MUTARI NON POTEST.

D. 2. 14. 38. *Cf.* D. 50. 17. 45. 1.

By *jus publicum* is meant that portion of the law in which the public interests are concerned, and which, therefore, is of absolute authority and not liable to be superseded by conventional law made by the agreement of private persons. *Cf.* the maxim: Modus et conventio vincunt legem. See § 124.

20. MODUS ET CONVENTIO VINCUNT LEGEM.

Co. Litt. 19a.

The general law may within certain limits be derogated from by the agreement of the persons concerned. Agreement is a source of conventional law between the parties. The term *modus* in this maxim means conditions, limitations, or restrictions imposed on the title to property by a grant, settlement, will, or other disposition. He who takes the property must take it *sub modo*—on the terms on which it is given to him. *Modus legem dat donatione.* Co. Litt. 19a.

21. NECESSITAS NON HABET LEGEM.

Cf. Bacon's Maxims of the Law, 5: Necessitas inducit privilegium. A recognition of the *jus necessitatis.* See § 139.

22. NEMINEM OPORTET LEGIBUS ESSE SAPIENTIOREM.

Bacon, De Augmentis, Lib. 8. Aph. 58. *Cf.* Aristotle, Rhetoric, I. 15. 12.

It is not permitted to be wiser than the laws. In the words of Hobbes (Leviathan, ch. 29), "the law is the public conscience," and every citizen owes to it an undivided allegiance, not to be limited by any private views of justice or expediency. See § 16.

23. NEMO PLUS JURIS AD ALIUM TRANSFERRE POTEST, QUAM IPSE HABERET.

D. 50. 17. 54.

The title of an assignee can be no better than that of his assignor. *Cf.* the maxim: Nemo dat qui non habet. See § 163.

24. NEMO TENETUR SE IPSUM ACCUSARE.

The law compels no man to be his own accuser or to give any testimony against himself—a principle now limited to the criminal law. See § 175.

25. NEMO DAT QUI NON HABET.

No man can give a better title than that which he himself has. See § 163.

26. NON OMNE QUOD LICET HONESTUM EST.

D. 50. 15. 144. pr.

All things that are lawful are not honourable. The law is constrained by the necessary imperfections of its methods to confer many rights and allow many liberties which a just and honourable man will not claim or exercise.

27. NULLUS VIDETUR DOLO FACERE, QUI SUO JURE UTITUR.

D. 50. 17. 55.

A malicious or improper motive cannot make wrongful in law an act which would be rightful apart from such motive. The rule, however, is subject to important limitations. See § 136.

28. QUI FACIT PER ALIUM, FACIT PER SE.

Co. Litt. 258 a.

He who does a thing by the instrumentality of another is considered as if he had acted in his own person.

29. QUI PRIOR EST TEMPORE POTIOR EST JURE.

Cf. C. 8. 17. 3: Sicut prior est tempore, ita potior jure.

Where two rights or titles conflict, the earlier prevails, unless there is some reason for preferring the later. See § 85.

30. QUOD FIERI NON DEBET, FACTUM VALET.

5 Co. Rep. 38.

A thing which ought not to have been done may nevertheless be perfectly valid when it *is* done. The penalty of nullity is not invariably imposed upon illegal acts. For example, a marriage may be irregularly celebrated, and yet valid; and a precedent may be contrary to established law, and yet authoritative for the future.

31. RES JUDICATA PRO VERITATE ACCIPITUR.

D. 1. 5. 25.

A judicial decision is conclusive evidence *inter partes* of the matter decided.

32. RESPONDEAT SUPERIOR.

Coke's Fourth Inst. 114.

Every master must answer for the defaults of his servant as for his own. See § 149.

33. SIC UTERE TUO UT ALIENUM NON LAEDAS.

9 Co. Rep. 59.

Every man must so use his own property as not to harm that of another. This is the necessary qualification of the maxim that every man may do as he will with his own. See § 154.

34. SUMMUM JUS SUMMA INJURIA.

Cicero, De Off. I. 10. 33.

The rigour of the law, untempered by equity, is not justice but the denial of it.

35. SUPERFICIES SOLO CEDIT.

Gaius, 2. 73.

Whatever is attached to the land forms part of it. *Cf.* Just. Inst. 2. 1. 29: Omne quod inaedificatur solo cedit. See § 155.

36. UBI EADEM RATIO, IBI IDEM JUS.

This is the complement of the maxim, Cessante ratione legis, cessat lex ipsa. A rule of the common law should be extended to all cases to which the same *ratio* applies, and in the case of imperfect statute law extensive interpretation based on the *ratio legis* is permissible. See Vangerow, I. sect. 25.

37. UBI JUS IBI REMEDIUM.

Cf. the maxim of the Civilians. Ubi jus non deest nec actio deesse debet. Puchta, II. sect. 208, n.b.

Whenever there is a right, there should also be an action for its enforcement. That is to say, the substantive law should determine the scope of the law of procedure, and not *vice versa.* Legal procedure should be sufficiently elastic and comprehensive to afford the requisite means for the protection of all rights which the substantive law sees fit to recognise. In early systems this is far from being the case. We there find remedies and forms of action determining rights, rather than rights determining remedies. The maxim of primitive law is rather, Ubi remedium ibi jus.

38. VIGILANTIBUS NON DORMIENTIBUS JURA SUBVENIUNT.

Cf. D. 42. 8. 24: Jus civile vigilantibus scriptum est.

The law is provided for those who wake, not for those who slumber and sleep. He who neglects his rights will lose them. It is on this principle that the law of prescription is founded. See § 162.

39. VOLENTI NON FIT INJURIA.

Cf. D. 47. 10. 1. 5: Nulla injuria est, quae in volentem fiat.

No man who consents to a thing will be suffered thereafter to complain of it as an injury. He cannot waive his right and then complain of its infringement.

APPENDIX IV.

THE DIVISIONS OF THE LAW.

English law possesses no received and authentic scheme of orderly arrangement. Exponents of this system have commonly shown themselves too little careful of appropriate division and classification, and too tolerant of chaos. Yet we must guard ourselves against the opposite extreme, for theoretical jurists have sometimes fallen into the contrary error of attaching undue importance to the element of form. They have esteemed too highly both the possibility and the utility of ordering the world of law in accordance with the straitest principles of logical development. It has been said by a philosopher concerning human institutions in general, and therefore concerning the law and its arrangement, that they exist for the uses of mankind, and not in order that the angels in heaven may delight themselves with the view of their perfections. In the classification of legal principles the requirements of practical convenience must prevail over those of abstract theory. The claims of logic must give way in great measure to those of established nomenclature and familiar usage; and the accidents of historical development must often be suffered to withstand the rules of scientific order. Among the various points of view of which most branches of the law admit, there are few, if any, which may be wisely adopted throughout their whole extent, and among the various alternative principles of classification, expediency allows of no rigidly exclusive and consistent choice. There are few distinctions, however important in their leading applications, which may not rightly, as they fade towards the boundary line, be replaced by others which there possess a deeper significance. We may rest content, therefore, if, within the limits imposed by the needful conformity to received speech and usage, each portion of the law is dealt with in such of its aspects as best reveals its most important characters and relations, and in such order as is most consistent with lucid and concise exposition.

1. *The Introductory Portion of the Law.*

The first portion of the *corpus juris* is of an introductory nature, consisting of all those rules which by virtue of their preliminary character or of the generality of their application cannot be appropriately relegated to any special department. This introduction may be divided into four parts. The first of them is concerned with the sources of law. It comprises all those rules in accordance with which new law obtains recognition and the older law is modified or abrogated. It is here, for example, that we must look for the legal doctrine as to the operation of precedent, custom, and legislation. The second part of the Introduction deals with the interpretation of law. Here we shall find the rules in accordance with which the language of the law is to be construed, and also the definitions of those terms which are fitly dealt with here, because common to several departments of the law. In the third place the Introduction comprises the principles of private international law—the principles, that is to say, which determine the occasional exclusion of English law from English courts of justice, and the recognition and enforcement therein of some foreign system which possesses for some reason a better claim to govern the case in hand. Fourthly and lastly, it is necessary to treat as introductory a number of miscellaneous rules which are of so general an application as not to be appropriately dealt with in any special department of the legal system.

2. *Private and Public Law.*

After the Introduction comes the body of Private Law as opposed to that of Public Law. By general consent this Roman distinction between *jus privatum* and *jus publicum* is accepted as the most fundamental division of the *corpus juris*. Public law comprises the rules which specially relate to the structure, powers, rights, and activities of the state. Private law includes all the residue of legal principles. It comprises all those rules which specially concern the subjects of the state in their relations to each other, together with those rules which are common to the state and its subjects. In many of its actions and relations the state stands on the same level as its subjects, and submits itself to the ordinary principles of private law. It owns land and chattels, makes contracts, employs agents and servants, and enters into various forms of commercial undertaking; and in respect of all these matters it differs little in its juridical position from its own subjects. Public law, therefore, is not the *whole* of the law that is applicable to the state and to its relations with its subjects, but only those parts of it which are different from the private law concerning the subjects of the state and their relations to each other. For this reason private law precedes public in the order of exposition. The latter presupposes a knowledge of the former.

The two divisions of public law are constitutional and administrative law. It is impossible, however, to draw any rigid line between these two, for they differ merely in the degree of importance pertaining to their subject-matters. Constitutional law deals with the structure, powers, and functions of the supreme power in the state, together with those of all the more important of the subordinate departments of government. Administrative law, on the other hand, is concerned with the multitudinous forms and instruments in and through which the lower ranges of governmental activity manifest themselves (*a*).

3. *Civil and Criminal Law.*

Within the domain of private law the division which calls for primary recognition is that between civil and criminal law. Civil law is that which is concerned with the enforcement of rights, while criminal law is concerned with the punishment of wrongs. We have examined and rejected the opinion that crimes are essentially offences against the state or the community at large, while civil wrongs are committed against private persons. According to the acceptance or rejection of this opinion, criminal law pertains either to public or to private law. Our classification of it as private is unaffected by the fact that certain crimes, such as treason and sedition, are offences against the state. As already explained, logical consistency in the division of the law is attainable only if we are prepared to disregard the requirements of practical convenience. Greater weight is wisely attributed to the fact that treason and robbery are both crimes, than to the fact that the one is an offence against the state and the other an offence against an individual.

Just as the law which is common to both state and subject is considered under the head of private law alone, so the law which is common to crimes and to civil injuries is dealt with under the head of civil law alone. It is obvious that there is a great body of legal principles common to the two departments. The law as to theft involves the whole law as to the acquisition of property in chattels, and the law of bigamy involves a considerable portion of the law of marriage. The arrangement sanctioned by usage and convenience is, therefore, to expound first the civil law in its entirety, and thereafter, under the title of criminal law, such portions of the law of crime as are not already comprehended in the former department.

(*a*) For a criticism of this treatment see F. J. Port, Administrative Law, p. 12. See also, on the nature of administrative law, C. K. Allen, Some Aspects of Administrative Law, Journal of the Society of Public Teachers of Law, 1929, p. 10; and J. H. Morgan's Introduction to G E. Robinson's Public Authorities and Legal Liability, pp. lxiii *et seq.*

4. *Substantive Law and the Law of Procedure.*

Civil and criminal law are each divisible into two branches, namely substantive law and the law of procedure, a distinction the nature of which has already been sufficiently considered.

5. *Divisions of the Substantive Civil Law.*

The substantive civil law may be conveniently divided, by reference to the nature of the rights with which it is concerned, into three great branches, namely the law of property, the law of obligations, and the law of status. The first deals with proprietary rights *in rem*, the second with proprietary rights *in personam*, and the third with personal as opposed to proprietary rights.

6. *The Law of Property.*

Although the distinction between the law of property and that of obligations is a fundamental one, which must be recognised in any orderly scheme of classification, there is a great part of the substantive civil law which is common to both of these branches of it. Thus the law of inheritance or succession concerns all kinds of proprietary rights whether *in rem* or *in personam*. So also with the law of trusts and that of securities. In general the most convenient method of dealing with these common elements is to consider them once for all in the law of property, thus confining the law of obligations to those rules which are peculiar to obligations; just as the elements common to civil and criminal law are dealt with in the civil law, and those common to private and public law in private law.

The law of property is divisible into the following chief branches: (1) the law of corporeal property, namely the ownership of land and chattels; (2) the law of immaterial objects of property, such as patents, trade-marks, and copyrights; (3) the law of encumbrances or *jura in re aliena*, such as tenancies, servitudes, trusts, and securities; (4) the law of testamentary and intestate succession.

7. *The Law of Obligations.*

The law of obligations comprises the law of contracts, the law of torts, and the law of those miscellaneous obligations which are neither contractual nor delictal. It may be convenient to consider under the same head the law of insolvency, inasmuch as the essential significance of insolvency is to be found in its operation as a method of discharging debts and liabilities. Alternatively, however, this branch of law may be included in the law of property, inasmuch as it deals with one mode of divesting proprietary rights in general. In the law of obligations is also to be classed the law of companies, this being essentially a development of the law of the contract of partnership. Under the head of companies are to be comprised all forms of *contractual* incorporation, all other bodies corporate pertaining either to public law or to special departments of private law with which they are exclusively concerned. The *general* doctrine as to corporations is to be found in the introductory department of the law.

8. *The Law of Status.*

The law of status is divisible into two branches dealing respectively with domestic and extra-domestic status. The first of these is the law of family relations, and deals with the nature, acquisition, and loss of all those personal rights, duties, liabilities, and disabilities which are involved in domestic relationship. It falls into three divisions, concerned respectively with marriage, parentage, and guardianship. The second branch of the law of status is concerned with all the personal rights, duties, liabilities, and disabilities, which are external to the law of the family. It deals, for example, with the personal status of minors (in relation to others than their parents), of married women (in relation to others than their husbands and children), of lunatics, aliens, convicts, and any other classes of persons whose personal condition is sufficiently characteristic to call for separate consideration (*b*).

There is one class of personal rights which ought in logical strictness to be dealt with in the law of status, but is commonly and more conveniently considered elsewhere—those rights, namely, which are called *natural*, because they belong to all men from their birth, instead of being subsequently acquired: for example, the rights of life, liberty, reputation, and freedom from bodily harm. These are personal rights and not proprietary; they constitute part of a man's status, not part of his estate; yet we seldom find them set forth in the law of status (*c*). The reason is that such rights, being natural and not acquired, call for no consideration, except in respect of their *violation*. They are adequately dealt with, therefore, under the head of civil and criminal wrongs. The exposition of the law of libel, for example, which is contained in the law of torts, involves already the proposition that a man has a right to his reputation; and there is no occasion, therefore, for a bald statement to that effect in the later law of status.

(*b*) No small part of this branch of the law of status, however, may be conveniently dealt with in connexion with various departments of the law of property and obligations. It may be best, for example, to discuss the contractual capacity of different classes of persons in the law of contracts, instead of in the law of the personal status of these persons.

(*c*) Blackstone, however, is sufficiently scrupulous in respect of logical arrangement to include them in this department of the law.

SUMMARY.

THE DIVISIONS OF THE LAW.

- I. Introduction
  - A. Sources of the Law.
  - B. Interpretation and Definitions.
  - C. Private International Law.
  - D. Miscellaneous Introductory Principles.
- II. Private Law
  - Civil Law
    - Substantive
      - Property
        - 1. Corporeal Property
          - Land.
          - Chattels.
        - 2. Immaterial Property
          - Patents.
          - Trade-marks, &c.
        - 3. Encumbrances
          - Leases.
          - Servitudes.
          - Trusts.
          - Securities, &c.
        - 4. Succession
          - Testamentary.
          - Intestate.
      - Obligations
        - 1. Contracts
          - General Part.
          - Special Part.
        - 2. Torts
          - General Part.
          - Special Part.
        - 3. Miscellaneous Obligations.
        - 4. Insolvency.
        - 5. Companies.
      - Status
        - Domestic Status
          - Marriage.
          - Parentage.
          - Guardianship.
        - Extra-domestic Status
          - Infants.
          - Married women.
          - Lunatics.
          - Aliens.
          - Convicts, &c
    - Procedure
      - Practice.
      - Evidence.
  - Criminal Law
    - Substantive
      - General Part.
      - Special Part
    - Procedure.
- III. Public Law
  - Constitutional Law.
  - Administrative Law.

APPENDIX V.

THE TERRITORY OF THE STATE.

In Chapter V. § 38, the legal conception of state-territory has been very briefly considered. Territory was there defined as being conceived of as that portion of the earth's surface which is in the exclusive possession and control of the state. Though this definition is perhaps sufficient for the limited purposes of that chapter, the complexities of modern constitutional arrangements and international relations are such as to render necessary for any complete analysis a much more detailed consideration than that which would have been there appropriate. The purpose of this Appendix is therefore to supplement the brief and general statement contained in Chapter V. by considering the conception of state-territory with special reference to the constitutional structure of the British Empire.

The British Empire, if we use that term in its widest permissible sense, consists of two parts which are essentially different from each other in their constitutional and international significance. The first part consists of the British Dominions, and the second of the British Protectorates.

The British Dominions are themselves divisible into two parts. The first consists of the British realm, that is to say, the United Kingdom of Great Britain and Ireland. The second consists of the British Possessions, that is to say, all the British dominions beyond the seas (*a*). These possessions are part of the King's dominions, but they are not part of his kingdom or realm. They are dependencies of the realm, that is to say, accessory or appurtenant thereto but not incorporated therein. *The distinction between the British realm and British possessions pertains to English legal history rather than to legal theory.* In earlier times there were three distinct methods by which the King of England extended his dominions. The first was that of extending the borders of the realm or kingdom of England. The realm grew by incorporating as constituent portions thereof adjoining territories acquired by conquest or other-

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(*a*) Interpretation Act, 1889, s. 18.

wise. It was in this manner that the petty kingdoms of the Saxon Kings grew into the kingdom of England. The second method was that by which the King, instead of extending his realm of England, acquired by inheritance or otherwise some other realm which he held concurrently with his English kingdom but did not incorporate therewith. This concurrence of two kingdoms and two crowns is known as a personal union between them, as opposed to the real union of incorporation. Thus James I. became by inheritance King of England, while already King of Scotland. But England and Scotland were not thereby merged together into a single realm. He held and governed two separate realms, one in right of his crown of England, and one in right of his crown of Scotland. In 1706, by the Act of Union, this merely personal union came to an end, and the two realms of England and Scotland were united together and became the new realm of Great Britain. In 1800 a similar personal union between the realm of Ireland and the realm of Great Britain came to an end by the statutory union of both into the United Kingdom of Great Britain and Ireland. Since then the King's realm has remained unaltered, although his dominions have extended far and wide (*b*). The third and last method by which the extension of the King's dominions is effected, is by the annexation of territory, not as part of the realm, but as accessory thereto. It is in this fashion that the colonies and other possessions beyond the seas have been acquired. On the one hand those far-off colonial possessions were not acquired in right of another crown or by way of merely personal union, as in the case of Scotland, Ireland, or Hanover. Nor, on the other hand, were they acquired by way of incorporation within the King's existing realm. His overseas Empire grew by a process intermediate between these two extremes. These new dominions were acquired in right of his crown of England and not otherwise; they belonged to him, that is to say, in his capacity as King of England. But on the other hand they were not conceived as extensions of the realm of England, but merely as accessory or appurtenant thereto. They were English territory but not part of England. They were dependencies of the realm and not portions of it. The distinction so drawn between the realm and its dependencies was one of great practical importance. It is by virtue of this distinction that the British Empire has grown into its present form as a composite, imperial, and world-wide state, including a number of constituent and self-governing states, each with its own legislature, government, and legal system, but in strict legal

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(*b*) There would seem to be room for an interesting and instructive monograph on the various meanings capable of being attached to the term "realm." It would be unwise, for example, to assume that when, by what appears to be nowadays its full official description, the Great Seal is referred to as the "Great Seal of the Realm," the "realm" in question is necessarily to be construed in a sense pointedly exclusive of His Majesty's overseas possessions.

theory subject throughout to the King and Parliament at Westminster. The distinction between the realm and its dependencies, however, did not begin with the era of colonial expansion overseas. It originated within the British Islands themselves. Wales, for example, was a dependency of the realm long before it became part of the realm. Its union with England by Act of Parliament in 1536 was the incorporation of one of the King's dominions, held by him in right of his crown of England, with the realm of England itself. This union therefore differed essentially from the subsequent union between England and Scotland, which was the union of two of the King's realms, not the union of his realm with one of its dependencies.

The legal position of the realm itself has within the last few years undergone a singular change. It was formerly a unitary state. Now, since the extension of self-governing authority to Ireland by the Government of Ireland Act, 1920, and the Irish Free State Constitution Act, 1922, it has become a composite state, inasmuch as certain portions of the realm have become themselves dependent states within its borders. Northern Ireland and the Irish Free State have now a system of government—legislative, executive, and judicial—distinct from that of the rest of the realm, namely Great Britain. Ireland still retains in 1930 its legal status as part of the United Kingdom of Great Britain and Ireland (*c*). The two self-governing states into which Ireland has been divided are not dependencies of the realm or British possessions, like India, Canada, or Australia, but remain part of the realm itself. But the new position attained by Ireland marks the establishment within the realm of that system of composite self-government which has hitherto been confined to the King's possessions beyond the seas.

The word realm is also used in a narrow sense to mean England only, and not the whole of the United Kingdom; as when we speak of the common custom or the common law of the realm. England is the old realm—the realm which is governed by the common law—the realm of English law and of English courts. When the new realm of Great Britain was constituted by the union of England and Scotland, this political union was not also a union of territorial laws and of the territorial jurisdiction of the law courts. There came into existence for the first time a distinction between the territorial area of the kingdom and the territorial area of the jurisdiction of English courts and of the authority of English law. The latter area was once

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(*c*) It may be mentioned that the King's style and title, since its alteration by Act of Parliament in 1926, no longer speaks of a United Kingdom of Great Britain and Ireland. If, however, as Sir John Salmond contends, the old line of demarcation between the realm and the possessions did indeed survive unaffected the Acts of 1920 and 1922, it would be difficult to maintain that the Act of 1926, concerned with ceremonial nomenclature rather than with substance, will incidentally have brought about a shifting of that line.

in truth the realm, and may still for many purposes be conveniently called by that name.

The established classification of the British possessions beyond the seas is largely a matter of historical development rather than of law. They are classified as follows:—

1. The British Islands other than Great Britain and Ireland—that is to say, the Channel Islands and the Isle of Man. These are not part of the realm, but are dependencies of the realm. Legally they are in the same position as colonies, but for historical reasons they are not classified as such.

2. British India, that is to say, that part of India which is a British dominion, as opposed to those numerous portions which are still recognised as the territory of protected Indian princes and are therefore in law British protectorates.

3. British Colonies, that is to say, all British dominions beyond the seas which possess separate local government, other than the British Islands and British India (*d*).

4. British Settlements, that is to say, those petty British possessions which though annexed by the Crown as part of the Empire have not yet acquired the status of a colony by the establishment of any separate system of local government, and for the government of which by the Crown itself statutory provision has been made by the British Settlements Act, 1887.

The remainder of the British Empire, after deducting the British dominions, consists of the British protectorates. Examples are Zanzibar, Bechuanaland, Nigeria, Uganda, Borneo, Tonga, and the numerous Protected Native States of India.

The common element which enables the dominions and the protectorates to be classed together as constituting the British Empire consists in the exercise of external sovereignty by the British Crown. Sovereignty, in this connexion, means the authority power or jurisdiction of a state in respect of any territory. External sovereignty means exclusive sovereignty as against all other states external to that territory. It means the exclusion of all such other states from any exercise by them of any right, title or authority over the territory in question. It is sovereignty *quoad exteros.* Internal sovereignty, on the other hand, is power, jurisdiction and authority claimed and exercised within the territory in respect of the government of the inhabitants thereof. These two kinds of sovereignty may or may not be combined and exercised concurrently by the same state in respect of the same territory. In the case of all British dominions they are so combined and exercised. In the case of all such dominions the Crown claims not merely external sovereignty, in respect of the

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(*d*) Interpretation Act, 1889, s. 18.

exclusion of all alien interference on the part of other states, but also internal sovereignty in respect of the exercise within the territory of unrestricted governing authority. In the case of a protectorate, however, this concurrence of the two kinds of sovereignty does not necessarily exist. Although external sovereignty is essential, internal sovereignty may or may not exist; and if it does exist, it may or may not exclude the concurrent exercise of a measure of internal sovereignty by a local government which is still suffered to exist and to exercise its internal functions.

With reference, therefore, to internal sovereignty protectorates are of three kinds:—

1. The first consists of those protectorates over which the Crown exercises external sovereignty only. The internal sovereignty is left wholly to some local government to which the territory is recognised as still belonging, notwithstanding the fact that as against all other states the territory is regarded as exclusively within British jurisdiction. This is understood, for example, to be the case with the Protected Native States of India. Externally these states are included within the outer boundaries of the British Empire. They possess no international relation to other states. The internal government of these states, however, is solely in the hands of their own native princes. Whatever authority is exercised over them by the Crown is exercised by way of international relationship and diplomacy only, and not by way of constitutional law.

2. The second class of protectorates consists of those in which the Crown exercises not merely exclusive external sovereignty, but also some measure of internal sovereignty, concurrently, however, with some other local state to which the territory belongs. This is so, for example, with the protectorate of Zanzibar. The internal government of such protectorates is divided between the British Crown and a local ruler who bears an international relation to the Crown and is not merely, like the governor of a colony, an agency of local government to whom the constitutional law of the Empire has delegated a portion of the Crown's authority. Some portions of the internal government are exclusively British, while the remaining portions are committed to the local authority, and the boundary-line between the two jurisdictions is drawn as the Crown, in the case of each protectorate, thinks fit. The authority of the Crown so to exercise internal sovereignty in British protectorates is recognised and regulated by an Act of Parliament known as the Foreign Jurisdiction Act, 1890. Under this Act Orders in Council are issued determining in respect of each protectorate the organisation, extent and exercise of royal governing authority within that protectorate.

3. The third class of protectorates is that in which the Crown exercises not merely external sovereignty, but also exclusive internal sovereignty. The entire government of the protectorate is in British

hands. Any system of local government which exists is not, as in the second class of protectorates, that of a state recognised as possessing an international relation to the Crown, but is that of a constitutional instrument or agency of the royal authority. Bechuanaland, Nigeria and other African protectorates are examples of this class. The royal authority in such protectorates is exercised by Orders in Council under the Foreign Jurisdiction Act, 1890, in the same manner as in protectorates of the second class (*e*).

Protectorates of the first and second kind are commonly distinguished as Protected States, in respect of the existence therein of a semi-independent government of international status. Protectorates of the third class, within which there is no such government, are conveniently distinguished as Colonial Protectorates, in respect of the close resemblance which exists between them and a British colonial possession.

I have already said that the essential element common both to British dominions and to British protectorates is the exercise by the British Crown of an exclusive claim of external sovereignty. Both the King's dominions and his protectorates are held by him in his exclusive possession and authority *adversus extraneos*. It now remains to inquire what is the essential difference between these two portions of the Empire. It is clear from the foregoing observations that this distinction cannot be found in the presence or absence of British internal sovereignty. For we have seen that in one class of protectorate such sovereignty is not exercised, while it is exercised in the other two classes. Neither can the distinction be found in the presence or absence of a semi-independent government recognised as possessing an international as opposed to a constitutional relation with the Crown. For we have seen that in the case of a colonial protectorate no such government exists. What, then, is the true distinction? It lies essentially in this, that the constitutional law of the Empire recognises British dominions as British territory, and refuses such recognition to British protectorates.

We may put the same distinction in another manner. Internal sovereignty—that is to say, a state's governing authority or jurisdiction within a territory—is of two kinds, distinguishable as territorial and extra-territorial. Territorial sovereignty is that which is possessed and exercised by a state within its own territory. Extra-territorial sovereignty is that which is possessed and exercised by a state in territory which is not its own, but is either the territory of some other state or is not that of any state at all. Extra-territorial sovereignty is known in the language of English constitutional law as foreign jurisdiction, and is the subject-matter, as already indicated,

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(*e*) Examples of Orders in Council under this Act may be seen in Volume V. of the Statutory Rules and Orders Revised (1904).

of the Foreign Jurisdiction Act, 1890. It is jurisdiction within territory which is foreign to the Crown, because it does not belong to the Crown. It may or may not be the territory of some other state.

Within British dominions the jurisdiction or sovereignty of the Crown is territorial; within British protectorates it is extra-territorial or foreign.

The three classes of protectorates may therefore be distinguished as follows:—

1. Protected States, in respect of which the Crown exercises external sovereignty only, without foreign jurisdiction, the sole internal governing authority being the territorial jurisdiction of the protected state itself.

2. Protected States in respect of which the Crown exercises not only external sovereignty, but also a certain measure of foreign jurisdiction, the internal government of the territory being divided between the extra-territorial sovereignty of the Crown and the territorial sovereignty of the protected state itself.

3. Colonial Protectorates, in respect of which the Crown exercises not only external sovereignty, but also foreign jurisdiction, and in which there is no local government exercising any concurrent authority by way of territorial sovereignty.

A British protectorate may therefore be defined as a territory over which the Crown exercises external sovereignty, and in which any internal sovereignty which may be exercised by the Crown is exercised by way of foreign jurisdiction merely, and not, as in the case of British dominions, by way of territorial sovereignty.

It must be noted, however, that foreign jurisdiction is not limited to protectorates. It may be exercised within territories which are not within the external sovereignty of the Crown, and are therefore not included within the British Empire at all. By treaty or otherwise the Crown, in common with other European Governments, has acquired a certain measure of internal governing authority within the territories of certain states in which, by reason of their imperfect civilization and development, such jurisdiction is required for the protection of British interests, but in respect of which no external sovereignty is claimed as in the case of protectorates. In China, for example, the Crown exercises in this manner legislative and judicial authority over resident British subjects. This legislation assumes the form of Orders in Council, and the laws so made are judicially administered by British courts sitting within Chinese territory and there exercising extra-territorial or foreign jurisdiction.

This, indeed, is the earliest form of foreign jurisdiction, and it was primarily with reference thereto that the Foreign Jurisdiction Act, 1890, and the earlier Acts for the same purpose were enacted. There is no legal difference between the internal jurisdiction which the Crown exercises in China and that which it exercises within the Colonial Protectorate of Bechuanaland or within the protected State of Zanzibar. In all these cases equally, the legal basis of the Crown's authority is to be found in the Foreign Jurisdiction Act, and it is exercised by means of Orders in Council issued under that Act.

The foregoing distinctions are indicated in the following tables:—

- External sovereignty
  - Over British dominions
    - The realm of the United Kingdom.
    - British possessions.
  - Over British protectorates
    - Without foreign jurisdiction
    - With foreign jurisdiction concurrent with local territorial sovereignty
      - Protected States.
    - With foreign jurisdiction exclusive of local territorial sovereignty
      - Colonial protectorates

- Internal sovereignty
  - Territorial jurisdiction
    - In British Dominions.
  - Foreign jurisdiction
    - In British protectorates
      - Concurrent with local territorial sovereignty
        - Protected States.
      - Exclusive of local territorial sovereignty
        - Colonial protectorates.
    - In independent States: *e.g.*, China.

The statement that a British protectorate is not British territory creates no difficulty in the case of protected states as opposed to colonial protectorates. In such states the territory is that of the protected government which exercises internal, territorial sovereignty there, and not that of the Crown, which exercises merely external sovereignty and some measure of foreign jurisdiction. The right of the Crown over such territory is in the nature not of *dominium*, but of *jus in re aliena*. What is the meaning, however, of the statement that a British colonial protectorate is not British territory? There is no other state to which the territory can be regarded as belonging. The whole governing authority of such a protectorate, whether external or internal, is in the hands of the Crown. In respect of the nature and extent of such governing authority, there is no practical or *de facto* difference between a colonial protectorate and a British colony. If, therefore, the territory of a state is correctly and sufficiently defined as territory over which the state exercises exclusive sovereignty and jurisdiction, the Protectorate of Nigeria is as much British territory as is the Crown Colony of Hongkong.

The only solution of this difficulty lies in the recognition in the case of territory, as in the case of so many other legal conceptions, of the distinction between that which exists in fact and that which exists in law. All British territory in fact is not British territory in law. British territory *de facto* is that in which the Crown does in fact exercise exclusive governing authority. British territory *de jure* is that which is recognised by the *ipse dixit* of the law as being British territory. If the law grants no such recognition, the jurisdiction exercised by the Crown is in law foreign or extra-territorial jurisdiction only, and not territorial sovereignty, even though in fact it differs in no respect from that which is exercised over a British possession. By the law of England the status of British territory is not acquired merely by the *de facto* exercise of sovereignty and jurisdiction, however complete or exclusive. The essential legal prerequisite is the voluntary act of the Crown known as annexation. Before any territory becomes in law British territory, the Crown must in the exercise of the royal prerogative, whether formally or by necessary implication, elect to annex or incorporate that territory as one of the Crown's possessions and as the subject of its territorial sovereignty, and not merely elect to exercise in respect of it that foreign or extra-territorial jurisdiction which is in legal theory distinct from territorial sovereignty, though in their factual manifestations they are often indistinguishable. The only reason, therefore, why a colonial protectorate is not British territory and a British possession is the *ipse dixit* of the Crown and of the law. *Stet pro ratione voluntas.* Moved by practical considerations, partly of a legal and partly of a political or international nature, the Crown, while willing in effect to exercise over foreign territory such external sovereignty and internal jurisdiction as amount in fact to complete and exclusive governing authority, nevertheless refuses to annex it as a British possession and therefore to confer upon it the status of British territory.

The legal differences between a protectorate which is British territory in fact but not in law and a British possession which is British territory both in fact and in law are numerous and important. It is sufficient here, by way of illustration, to say that British nationality is acquired by birth in British territory, and therefore that it is not acquired (speaking generally) by birth in a British protectorate. Similarly the annexation of foreign territory as British confers British nationality upon the resident subjects of the state from which the territory was acquired, whereas the establishment of a British protectorate has no effect in conferring British citizenship on its inhabitants. Similarly it is commonly held that the acquisition of a new British possession, otherwise than by conquest from a civilised state, has the effect of introducing into that possession the English common law; whereas no such result follows from the establishment of a protectorate.

It may be pointed out in conclusion that the legal conception of state-territory is distinct from that of state-ownership. Nevertheless the two conceptions are analogous, not a few legal principles and a good deal of legal nomenclature being common to both. When we say that certain lands belong to or have been acquired by the Crown, we may mean either that they are the territory of the Crown or that they are the property of the Crown. The first conception pertains to the domain of public law, the second to that of private law. Territory is the subject-matter of the right of sovereignty or *imperium*, while property is the subject-matter of the right of ownership or *dominium*. These two rights may or may not co-exist in the Crown in respect of the same area. Land may be held by the Crown as territory but not as property, or as property but not as territory, or in both rights at the same time. As property, though not as territory, land may be held by one state within the dominions of another. This distinction between territorial sovereignty and ownership is to some extent obscured by the feudal characteristics of the British constitution. In accordance with the principles of feudal law all England was originally not merely the territory but also the property of the Crown; and even when it is granted to subjects, those grantees are in legal theory merely tenants in perpetuity of the Crown, the legal ownership of the land remaining vested in the Crown. So, in accordance with this principle, when a new colonial possession is acquired by the Crown and is governed by English law, the title so acquired is not merely territorial, but also proprietary. When New Zealand became a British possession, it became not merely the Crown's territory, but also the Crown's property, *imperium* and *dominium* being acquired and held concurrently. The old chartered companies of the American colonies held the lands granted to them by the Crown by the same double title, as territory and as property. Those rights, however, were severable. The companies might alienate their lands and retain their territories, or might surrender their territories and *jura regalia* to the Crown, while retaining their lands and proprietary interests. In a British protectorate the land, as we have seen, is not the territory of the Crown, but it or any part of it may none the less be Crown land. If the common law of England is introduced into a colonial protectorate, all the land in that protectorate may in accordance with feudal principles vest in the Crown, but the protectorate will not for that reason become British territory or be transformed into one of the dominions of the Crown (*f*) (*g*).

(*f*) As to the Crown's ownership of land in a protectorate, see *In re Southern Rhodesia*, (1919) A. C. 211.

(*g*) If the system of mandates invented by the Treaty of Versailles is to be brought into any coherent relation to traditional English constitutional law and practice, mandated territories under British control should be regarded for purposes of constitutional law as amounting in effect to a new species of protectorates, differentiated from protectorates of the older types only by the existence of international obligations as to the method of their administration. A recent, handy and authoritative treatment of the protectorate and mandate relationships may be found in the last two chapters of Sir Anton Bertram's The Colonial Service.

APPENDIX VI.

INTERNATIONAL LAW.

The nature of international law or the law of nations has been summarily considered in Chapter I. of this treatise. The opinion therein expressed was that this law has its source in international agreement, that it consists of the rules expressly or impliedly agreed on by sovereign states as regulating their conduct and relations to one another, and therefore that it is to be classified as a form, and indeed the most important form, of conventional law. Writers, however, are far from being unanimous in their analysis of the essential nature of the law of nations, and it seems advisable to supplement the former discussion of this matter by examining the various views which have been adopted by different authorities. The competing theories may be classified as follows:—

(1) That the law of nations is, or at least includes, a branch of *natural* law, namely the rules of natural justice as applicable to the relations of states *inter se.*

(2) That it is a kind of *customary* law, namely, the rules actually observed by states in their relations to each other.

(3) That it is a kind of *imperative* law, namely, the rules enforced upon states by international opinion or by the threat or fear of war.

(4) That it is a kind of *conventional* law, as already explained.

Having accepted the last of those theories as correct, let us shortly consider the nature and claims of the three others.

The law of nations as natural law.—All writers on international law may be divided into three classes by reference to their opinions as to the relation between this law and the principles of natural justice. The first class consists of those who hold that the law of nations is wholly included within the law of nature—that it consists merely of the principles of natural justice so far as applicable to sovereign states in their relations and conduct towards each other—that the study of international law is simply a branch of moral philosophy—and that there is no such thing as a positive law of nations, consisting of a body of artificial rules established by states themselves. Thus Hobbes says (*a*): "As for the law of nations, it is

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(*a*) De Corpore Politico, Eng. Wks. IV. 228.

the same with the law of nature. For that which is the law of nature between man and man, before the constitution of commonwealth, is the law of nations between sovereign and sovereign after." The same opinion is expressed by Thomasius (*b*), Pufendorf (*c*), Burlamaqui (*d*), and others, but is generally discredited, though it is not destitute of support even yet.

A second opinion is that international law is both natural and positive—that it is divisible into two parts, distinguished as the natural law of nations, which consists of the rules of natural justice as between states, and the positive law of nations, consisting of rules established by states by agreement, custom, or in some other manner, for the government of their conduct towards each other. The natural law of nations is supplementary or subsidiary to the positive law, being applicable only when no positive rule has been established on the point. Representatives of this opinion are Grotius, Wolf, Vattel, Blackstone, Halleck, Wheaton, Phillimore, Fiore, Twiss, and others. The third opinion is that international law is wholly positive—that it consists exclusively of a set of rules actually established in some way by the action of sovereign states themselves—and that the rules of natural justice are not in themselves rules of international law at all, but pertain to that law only if, and only so far as, they have been actually incorporated into the established system of positive law. This is now the prevalent opinion, and we have here accepted it as the correct one (*e*). By those who maintain it the rules of natural justice as between states are called international morality, and are distinguished by this name from international law. These two bodies of rules are partly coincident and partly discordant. The conduct of a state may be a breach of international morality but not of international law, or a breach of law though in accordance with morality, or it may be both immoral and illegal.

The question whether rules of natural justice are to be included as a part of international law is, indeed, in one aspect a mere question of words. For these rules exist, and states are in honour bound by them, and the question is merely as to the name to be given to them. Nevertheless, questions of words are often questions of practical importance, and it is of undoubted importance to emphasise by a difference of nomenclature the difference between rules of international morality, by which, indeed, states are bound whether they have agreed to them or not, but which are uncertain and subject to endless dispute, and those rules of international law, which by means

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(*b*) Fundamenta Juris Nat. et Gent. I. 5. 67.

(*c*) De Jure Nat. et Gent. II. 3. 23.

(*d*) Principes du droit de la nature et des gens, Vol. IV. p. 16, ed. (1820).

(*e*) It is maintained by such writers as Hall, Rivier, Bluntschli, Nys, Sidgwick, Westlake, Walker, Lawrence, and Oppenheim.

of international agreement have been defined and established and removed from the sphere of the discussions and insoluble doubts of moral casuistry.

The law of nations as customary law.—Even those writers who agree in the opinion that international law is or at least includes a system of positive law, differ among themselves as to the essential nature and source of these rules; and we proceed to consider the various answers that have been given to this question. Some writers consider that international law has its source in international custom—that it consists essentially and exclusively in the rules which are actually observed by sovereign states in their dealings with one another (*f*). This view, however, is not prevalent, and is, it is believed, unsound. International custom is not in itself international law; it is nothing more than one kind of evidence of the international agreement in which all such law has its source. There are many customs which, because they are based on no such underlying agreement, have not the force of law, states being at liberty to depart from them when they please. Conversely there is much law which is not based on custom at all, but on express international conventions. These conventions, if observed, will of course create a custom in conformity with the law; but they constitute law themselves from the time of their first making, and do not wait to become law until they have been embodied in actual practice. New rules of warfare established by convention in time of peace are law already in time of peace.

The law of nations as imperative law.—By some writers international law is regarded as a form of imperative law; it consists, they say, of rules enforced upon states by the general opinion of the society of states, and also in extreme cases by war waged against the offender by the state injured or by its allies. Thus Austin says (*g*): "Laws or rules of this species, which are imposed upon nations or sovereigns by opinions current among nations, are usually styled the law of nations or international law." In considering this view it is to be admitted that in many cases the rules of the law of nations are thus sanctioned and enforced by international opinion and force. But the question to be answered is whether this sanction is of the

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(*f*) "The sole source of (international) law," says Walker in his History of International Law, Vol. I. p. 21, "is actual observance." This law, he adds, p. 31, is "the embodiment of state practice." It is not easy to make a list of the genuine adherents of this opinion, because so many writers introduce vagueness and uncertainty into their exposition by speaking of international *consent*, as well as of international practice, as a source of law; and they fail to make it clear whether such practice is operative *per se*, or only as evidence of underlying consent. Moreover, the word consent is itself used ambiguously and vaguely, and it is often difficult to know whether it means international agreement, or international opinion, or the harmonious practice of states.

(*g*) I. p. 187.

essence of the matter; because, if it is so, all rules so sanctioned must be, and no others can be, rules of international law. It is clear, however, that the sanction of war cannot be the essential test; for in the first place this sanction is but seldom applied even to undoubted violations of international law, and in the second place it is at least as often resorted to when there is no violation of such law at all. What then shall be said of the alternative sanction of international opinion? Is this the test and essence of a rule of international law? For the following reasons it is submitted that it is not:—

(1) Many forms of state action are censured by public opinion, which are admittedly no violation of the law of nations. A state may act within its legal rights, and yet so oppressively or unjustly as to excite the adverse opinion of other nations.

(2) There may be violations of international law which are in the particular circumstances regarded as excusable, and approved by international opinion.

(3) Public opinion is variable from day to day—dependent on the special circumstances of the individual case—not uniform as we pass from state to state—not uniform even throughout the population of the same state. International law, on the other hand, is a permanent, uniform system of settled rules, independent of the fickle breath of public approbation or censure—made and unmade by the express or implied agreements of sovereign governments, and not by the mere opinions and prejudices which for the moment are in public favour. International law is one thing, international positive morality is another thing; but the doctrine here criticised identifies and confounds them as one. International law is made by the acts and contracts of governments; international opinion is made chiefly by journalists and the writers of books. Opinion, if sufficiently uniform and sufficiently permanent, will doubtless in time constrain the law into conformity with it; but it is not the same thing.

(4) Public opinion cannot be made the basis of any rational or scientific body of rules or legal doctrines. For such opinion is simply the belief of the public that certain forms of conduct are in conformity with natural justice. So far as this belief is well founded, the law based upon it is simply the law of nature; so far as it is erroneous, the law based on it is simply a mistake which disappears *ipso facto* on being recognised. It is impossible to recognise as a subject of scientific interpretation and investigation any international law based on erroneous public opinion; and if based on true opinion, it is nothing save the principles of natural justice.

Certain writers seek to avoid the first of these objections by so defining international law as to include only one portion of the body of rules approved and sanctioned by international opinion, the remaining portion constituting international positive morality. According to this opinion international law consists of those rules which international opinion not merely approves, but also regards as rightly enforceable by way of war. International positive morality, on the other hand, consists of those rules of which opinion approves, but of the enforcement of which by way of war it would not approve. That is to say, international law is distinguished from international morality by an application of the distinction familiar to the older moralists between duties of perfect and duties of imperfect obligation (*h*).

This view would seem to be exposed to all the objections already made to the cruder theory which we have just considered, with the exception of the first: and it is also exposed to this further criticism, that it is impossible thus to divide public opinion sharply into two parts by reference to the justification of war or any other kind of forcible compulsion. Whether such compulsion is right is a matter to be determined not by the application of any fixed or predetermined rules, but by a consideration of all the circumstances of the individual instance; and even then opinion will in most cases be hopelessly discordant. Moreover, there are forms of state action which are not the violation of any established rule of international law, and which nevertheless are so contrary to the rightful interests of another state that they would be held to be rightly prevented or redressed by way of war. Conversely there are rules of undoubted law which are of such minor importance that a war for the vindication of them would be viewed by international opinion as a folly and a crime.

(*h*) See Westlake, International Law, p. 7; Chapters on the Prls of Int Law. p. 2: Hall, Int Law. p 1: Sidgwick, Elements of Politics ch. 17 pp 274, *sqq*., 1st. ed.; Oppenheim, International Law, I. § 5

APPENDIX VII.

AUTHORITIES.

THE purpose of this appendix is to supply an explanation of the references contained in this work to the literature of jurisprudence. It has no claim to be regarded as a comprehensive guide to that literature. The editions mentioned are usually those to which the references relate, and are not necessarily the latest.

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Ch. D.—Reports of cases in the Chancery Division of the High Court.

A. C.—Appeal Cases, *i.e.* reports of cases in the House of Lords and Privy Council.

C. P. or C. P. D.—Reports of cases in the Court of Common Pleas, or the Common Pleas Division of the High Court.

Ex. or Ex. D.—Reports of cases in the Court of Exchequer, or the Exchequer Division of the High Court.

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Common Law—*continued.*

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WILSHERE'S INDERMAUR'S Principles of the Common Law. The Law of Contracts and Torts, with a Short Outline of the Law of Evidence. Re-written and enlarged by A. M. WILSHERE, Barrister-at-Law. Third Edition. 816 pages. Price £1 10s. net. 1932

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INDERMAUR'S Leading Common Law Cases; with some short notes thereon. Chiefly intended as a Guide to "SMITH'S LEADING CASES." Tenth Edition. by E. A. JELF, Master of the Supreme Court. With six illustrations by E. T. REED. 111 pages. Price 8s. 6d. net. 1922

The editor has introduced several new features with a view to assisting the student in remembering the principles of law dealt with, but the unique feature of the edition is the addition of six illustrations by Mr. E. T. Reed. After seeing these illustrations of the bull in the ironmonger's shop, the chimney-sweep and the jeweller, the six carpenters in the tavern, etc., you will find it easy to remember the cases and what points they decided. Every wise student reads this book.

COCKLE & HIBBERT'S Leading Cases in Common Law. With Notes, Explanatory and Connective, presenting a Systematic View of the whole Subject.

By E. Cockle and W. Nembhard Hibbert, LL.D., Barristers-at-Law. Second Edition. 962 pages. Price £2 2s. net. 1929

This book is on the same lines as Cockle's Cases on Evidence. It contains 771 cases.

Following is a short summary of its contents:—

- **Nature of the Common Law.**
- **Common Law Rights and Duties.**
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- **Simple Contracts.**
- **Void, etc., Contracts.**
- **Quasi-Contracts.**
- **Agency.**
- **Bailments.**
- **Carriers.**
- **Landlord and Tenant.**
- **Master and Servant.**
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"Dr. Hibbert is to be congratulated on the masterly manner in which he has re-edited Cockle's Leading Cases on Common Law. The arrangement and printing are particularly clear, the choice of cases is marked by great discretion, and a short analysis of the law of various departments dealt with in the book is set forth with a view to refreshing the reader's knowledge on the subject before he turns to read the cases which are set out."—*Law Coach.*

"The present work has the merits of thoroughness, accuracy, systematic arrangement and a modern point of view."—*Solicitors' Journal.*

SMITH'S Leading Cases. A Selection of Leading Cases in various Branches of the Law, with Notes. Thirteenth Edition. By Sir T. Willes Chitty, K.C., A. T. Denning and C. P. Harvey, Barristers-at-Law. 2 vols. Price £4 10s. net. 1929

This work presents a number of cases illustrating and explaining the leading principles of the common law, accompanied by exhaustive notes showing how those principles have been applied in subsequent cases.

COMPANIES.

CHARLESWORTH'S Principles of Company Law. Illustrated by Leading Cases. By J. Charlesworth, Barrister-at-Law. Price 7s. 6d. net. 1932

SMITH'S Summary of the Law of Companies. Fourteenth Edition, by W. HIGGINS, Barrister-at-Law. 325 pages. Price 7s. 6d. net. 1929

"No other elementary text-book contains the same amount of detail, and for examination purposes it is probably unsurpassed."—*Annual Survey of English Law, 1929.*

SOPHIAN'S Companies Act, 1929, with Introduction, Notes and Index. 266 pages. Price 10s. 6d. net. 1929

CONFLICT OF LAWS.

WESTLAKE'S Treatise on Private International Law, with Principal Reference to its Practice in England. Seventh Edition. By NORMAN BENTWICH, Barrister-at-Law. 436 pages. Price £1 7s. 6d. net. 1925

FOOTE'S Private International Law. Based on the Decisions in the English Courts. Fifth Edition. By H. H. L. BELLOT, LL.D., Barrister-at-Law. 661 pages. Price £1 15s. net. 1925

BELLOT'S Analysis of Foote's Private International Law. With leading cases. 64 pages. Price 3s. 6d. net. 1925

DICEY'S Digest of the Law of England with reference to the Conflict of Laws. Fifth Edition. 1003 pages. Price £2 15s. net. 1932

"Dicey" is the prescribed book for the Solicitors' Final Examination.

BURGIN & FLETCHER'S Students' Conflict of Laws. An Introduction to the Study of Private International Law, based on Dicey. Price £1 net. 1928

HIBBERT'S Leading Cases on Conflict of Laws. By W. N. HIBBERT, LL.D., Barrister-at-Law. 293 pages. Price £1 1s. net. 1931

Compiled on the same lines as Cockle's Cases on Evidence. It contains 200 cases and is an indispensable companion to all the text books on the subject.

CONSTITUTIONAL LAW AND HISTORY.

CHALMERS & ASQUITH'S Outlines of Constitutional Law. By D. Chalmers and Cyril Asquith, Barristers-at-Law. Fourth Edition. 470 pages. Price 15s. net. 1930

This work includes a survey of Central and Local Administrative Law and of Colonial Constitutions.

"If we are asked 'Is this a good cram book?' we must answer 'Yes.' It is the book used by most pass students and satisfies their one desire—to be enabled to pass the examination."—*Annual Survey of English Law, 1930.*

"A very sound treatise, distinctly above the average. This book supplies a long-felt want. The whole field is covered in an interesting manner, unusual in a work which does not claim to be anything more than an outline."—*New Cambridge.*

THOMAS & BELLOT'S Leading Cases in Constitutional Law. With Introduction and Notes. Sixth Edition. By H. H. L. Bellot, LL.D. Formerly Acting Professor of Constitutional Law in the University of London. 352 pages. Price 10s. 6d. net. 1927

Some knowledge of the chief cases in constitutional law is now required in many examinations, and is obviously necessary to the thorough student of constitutional history. This book extracts the essence of the cases with which the student is expected to be familiar, preserving always something of the concrete circumstance that is so helpful to the memory. It adds, where necessary, a short note to the individual case, and subjoins to each important group of cases some general remarks in the shape of a note. The cases are so arranged as to be convenient for ready reference.

TASWELL-LANGMEAD'S English Constitutional History. From the Teutonic Invasion to the Present Time. Designed as a Text-book for Students and others. Ninth Edition. By A. L. Poole, M.A., F.S.A., Fellow and Tutor, St. John's College, Oxford. 758 pages. Price 21s. net. 1929

"This is much more than a new edition. The book is the only one which gives the law student exactly what he wants." —*Annual Survey of English Law, 1929.*

"'Taswell-Langmead' has long been popular with candidates for examination in Constitutional History, and the present edition should render it even more so. It is now, in our opinion, the ideal students' book upon the subject."—*Law Notes.*

WILSHERE'S Analysis of Taswell-Langmead's Constitutional History. By A. M. WILSHERE, LL.B., Barrister-at-Law. 133 pages. Price 6s. 6d. net. 1929

HAMMOND'S Short English Constitutional History for Law Students. By EDGAR HAMMOND, B.A. 163 pages. Price 7s. 6d. net. 1920

GARSIA'S Constitutional Law and Legal History in a Nutshell. Including an Alphabetical Table of Writs and their Uses, a Comparative Table of the Constitutions of Canada, Australia and South Africa. Second Edition. By M. GARSIA, Barrister-at-Law. 104 pages. Price 4s. net. 1925

"I have looked over this book and find that it is admirably adapted for its purpose. For almost any type of student it should be invaluable if judiciously used with the standard Text Book."—*A Law Lecturer.*

GRIFFITH'S Questions and Answers in Constitutional Law and Legal History. By D. M. GRIFFITH. 86 pages. Price 5s. net. 1930

CONTRACTS.

(See also Common Law.)

WILSHERE'S Outline of Contracts and Torts. By A. M. WILSHERE and DOUGLAS ROBB, Barristers-at-Law. Third Edition. 155 pages. Price 7s. 6d. net. 1928

It is designed as an assistance to the memory of the Student who has read Odgers or Indermaur on the Common Law.

CARTER on Contracts. Elements of the Law of Contracts. By A. T. CARTER, of the Inner Temple, Barrister-at-Law, Reader to the Council of Legal Education. Seventh Edition. 272 pages. Price 12s. 6d. net. 1931

"We have here an excellent book for those who are beginning to read law."—*Law Magazine.*

SALMOND & WINFIELD on Contracts. Principles of the Law of Contract. By the late Sir JOHN W. SALMOND and P. H. WINFIELD, Barrister-at-Law. 544 pages. Price 30s. net. 1927

"Exceedingly clear and accurate in its statement of the principles of the law of contract."—*Law Notes.*

CONYERS' Contracts in a Nutshell. With Epitomes of Leading Cases. By A. J. CONYERS, Barrister-at-Law. 119 pages. Price 4s. net. 1930

SUSMAN'S Questions and Answers on Contracts. By B. SUSMAN, Barrister-at-Law. 134 pages. Price 6s. net. 1930

CONVEYANCING.

(See also Real Property.)

ELPHINSTONE'S Introduction to Conveyancing. By Sir HOWARD WARBURTON ELPHINSTONE, Bart. Eighth Edition, by HARRY FARRAR, Barrister-at-Law, Editor of Key and Elphinstone's Precedents in Conveyancing. [*In the press.*

"Incomparably the best introduction to the art of conveyancing that has appeared in this generation. It contains much that is useful to the experienced practitioner."—*Law Times.*

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DEANE & BURNETT'S Elements of Conveyancing, with an Appendix of Students' Precedents. Fifth Edition, by J. F. R. BURNETT, Barrister-at-Law. Text 432 pages, Precedents 72 pages. Price 21s. net. 1932

This book is complementary to and extends the information in the books on Real Property. The reader is taken through the component parts of Purchase Deeds, Leases, Mortgage Deeds, Settlements and Wills, and the way in which these instruments are prepared is explained. Previous to this is a short history of Conveyancing, and chapters on Contracts for Sale of Land dealing with the statutory requisites, the form, particulars and conditions of sale, the abstract of title, requisitions, etc., and finally there is a chapter on conveyance by registration. The second part of the book contains STUDENTS' PRECEDENTS IN CONVEYANCING, illustrating the various documents referred to in the first part. It is the only book containing a representative collection of precedents for students.

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"Students will find in this book a clear exposition of a difficult subject which solves most of their difficulties and deals with all the matters that concern them for examination purposes."—*Law Notes.*

CRIMINAL LAW AND PROCEDURE.

ODGERS on the Common Law. See page 7.

GARSIA'S Criminal Law and Procedure in a Nutshell. Fourth Edition. By M. GARSIA, Barrister-at-Law. 110 pages. Price 4s. net. 1929

Enumerates and classifies the more important crimes, gives a short history of the Criminal Courts and a brief outline of criminal procedure.

HARRIS'S Principles and Practice of the Criminal Law. Intended as a Lucid Exposition of the subject for the use of Students and the Profession. Fourteenth Edition. By A. M. WILSHERE, Barrister-at-Law. 576 pages. Price 15s. net. 1926

"This Standard Text-book of the Criminal Law is as good a book on the subject as the ordinary student will find on the library shelves . . . . The book is very clearly and simply written. No previous legal knowledge is taken for granted, and everything is explained in such a manner that no student ought to have much difficulty in obtaining a grasp of the subject. . . ."—*Solicitors' Journal.*

". . . . As a Student's Text-book we have always felt that this work would be hard to beat, and at the present time we have no reason for altering our opinion. . . . ."—*Law Times.*

WILSHERE'S Elements of Criminal and Magisterial Law and Procedure. By A. M. WILSHERE, Barrister-at-Law. Third Edition. 301 pages. Price 12s. 6d. net. 1922

WILSHERE'S Leading Cases illustrating the Criminal Law, for Students. Second Edition. 398 pages. Price 15s. net. 1924

"This book is a collection of cases pure and simple, without a commentary. In each case a short rubric is given, and then follow the material parts of the judge's opinions. The selection of cases has been judiciously made, and it embraces the whole field of criminal law. The student who has mastered this and its companion volume will be able to face his examiners in criminal law without trepidation."—*Scots Law Times.*

FARRIN'S Criminal Law for Examinees. Recent Examination Questions, with Answers by R. W. FARRIN, Barrister-at-Law. 128 pages. Price 6s. net. 1930

DICTIONARY.

The Concise Law Dictionary. By P. G. OSBORN, Barrister-at-Law. 333 pages. Price 15s. net. 1927

A book every student should have for general reference. It deals with existing law and with legal history. Legal maxims are translated, and there are glossaries of Latin, French and Early English words relating to the law. There is also a list of abbreviations used in citing law reports. A very useful feature is a digest of some four hundred leading cases.

EQUITY.

POTTER'S Introduction to the History of Equity and its Courts. By HAROLD POTTER, LL.D., Ph.D. 105 pages. Price 8s. 6d. net. 1931

SNELL'S Principles of Equity. Intended for the use of Students and Practitioners. Twentieth Edition. By H. G. RIVINGTON, M.A. Oxon., and A. C. FOUNTAINE. 595 pages. Price £1 10s. net. 1929

(—— Adapted for Indian Students. By S. C. BAGCHI. Price £1 1s. net. 1930)

"In a most modest preface the editors disclaim any intention to interfere with Snell as generations of students have known it. Actually what they have succeeded in doing is to make the book at least three times as valuable as it ever was before. Illustrations from cases have been deftly introduced, and the whole rendered simple and intelligible until it is hardly recognisable."—*The Students' Companion.*

BLYTH'S Analysis of Snell's Principles of Equity, with Notes thereon. By E. E. BLYTH, LL.D., Solicitor. Fourteenth Edition. 275 pages. Price 10s. 6d. net. 1929

"This is an admirable analysis of a good treatise; read with Snell, this little book will be found very profitable to the student." —*Law Journal.*

GARSIA'S Equity in a Nutshell. By M. GARSIA, Barrister-at-Law. 76 pages. Price 3s. 6d. net. 1928

FARRIN'S Equity for Examinees. Questions set at recent examinations, with Answers by R. W. FARRIN, Barrister-at-Law. 128 pages. Price 6s. net. 1930

STORY'S Commentaries on Equity Jurisprudence. Third English Edition. By A. E. RANDALL. 641 pages. Price 37s. 6d. net. 1920

WILSHERE'S Principles of Equity. Second Edition. By L. B. TILLARD, Barrister-at-Law. 590 pages. Price £1 2s. 6d. net. 1929

In this book the author has endeavoured to *explain* and enable the student to *understand* Equity. He has incorporated a large number of explanations from the authorities and has tried to make the subject intelligible while at the same time he has as much useful and relevant detail as the larger students' works. It is not a mere "cram" book.

"Mr. Wilshere has succeeded in giving us a very clear exposition of these principles. The book is far better balanced than the majority of text books, and the law is stated in its modern garb and is not, as in so many elementary works, almost lost to sight beneath a mass of historical explanatory matter."—*Sittings Review.*

WHITE & TUDOR'S Leading Cases in Equity. A Selection of Leading Cases in Equity; with Notes. Ninth Edition. By E. P. HEWITT, K.C. 2 vols. Price £4 10s. net. 1928

EVIDENCE.

All You Want for the Bar Final. See page 19.

COCKLE'S Leading Cases and Statutes on the Law of Evidence, with Notes, explanatory and connective, presenting a systematic view of the whole subject. By ERNEST COCKLE, Barrister-at-Law. Fourth Edition. By S. L. PHIPSON. 533 pages. Price 18s. 6d. net. 1925

This book and Phipson's Manual are together ***sufficient*** for all ordinary examination purposes, and will save students the necessity of reading larger works on this subject.

By an ingenious use of black type the author brings out the essential words of the judgments and Statutes, and enables the student to see at a glance the effect of each section.

"Of all the collections of leading cases compiled for the use of students with which we are acquainted, this book of Mr. Cockle's is, in our opinion, far and away the best. The student who picks up the principles of the English law of evidence from these readable and logical pages has an enormous advantage over a generation of predecessors who toiled through the compressed sentences of Stephen's little digest in a painful effort to grasp its meaning. Mr. Cockle teaches his subject in the only way in which a branch of law so highly abstract can ever be grasped; he arranges the principal rules of evidence in logical order, but he puts forward each in the shape of a leading case which illustrates it. Just enough of the headnote, the facts, and the judgments are selected and set out to explain the point fully without boring the reader; ***and the notes*** appended to the cases ***contain all the additional information that anyone can require in ordinary practice.***"—*Solicitors' Journal.*

Evidence—*continued.*

PHIPSON'S Manual of the Law of Evidence. Fourth Edition. 282 pages. Price 12s. 6d. net. 1928

This is an abridgment for students of Mr. Phipson's larger treatise. With Cockle's Cases it will be sufficient for examination purposes.

"The way of the student, unlike that of the transgressor, is no longer hard. The volume under review is designed by the author for the use of students. To say that it is the best text-book for students upon the subject is really to understate its usefulness; as far as we know there is in existence no other treatise upon evidence which gives a scientific and accurate presentment of the subject in a form and compass suitable to students."—*Australian Law Times.*

"We know no book on the subject which gives in so short a space so much valuable information. We readily commend the work both to students and to practitioners, especially those who, not being in possession of the author's larger work, wish to have an up-to-date and explanatory companion to 'Cockle.'"—*South African Law Journal.*

BEST'S Principles of Evidence. With Elementary Rules for conducting the Examination and Cross-Examination of Witnesses. Twelfth Edition. By S. L. PHIPSON, Barrister-at-Law. 673 pages. Price £1 12s. 6d. net. 1923

"The most valuable work on the law of evidence which exists in any country."—*Law Times.*

GARSIA'S Evidence in a Nutshell. By MARSTON GARSIA, Barrister-at-Law. 30 pages. Price 2s. 6d. net. 1929

FARRIN'S Questions and Answers on Evidence. By R. W. FARRIN. 67 pages. Price 3s. 6d. net. 1931

WROTTESLEY on the Examination of Witnesses in Court. Including Examination in Chief, Cross-Examination, and Re-Examination. With chapters on Preliminary Steps and some Elementary Rules of Evidence. Second Edition. By F. J. WROTTESLEY, of the Inner Temple, Barrister-at-Law. 173 pages. Price 6s. net. 1929

This is a practical book for the law student. It is interesting, and is packed full of valuable hints and information.

EXAMINATION GUIDES AND QUESTIONS.

The Concise Law Dictionary (*ante*, p. 15) is an indispensable book of reference.

GARSIA'S Digest of Questions set at Bar Examinations during the past six years. 121 pages. Price 6s. net. 1932

The questions are grouped logically under subjects, and references are given to text books where the answers will be found.

BROOKS'S All You Want for the Bar Final. A Condensed Cram Book, dealing with Torts, Contracts, Equity, Civil Procedure, Evidence, Pleading. By GRAHAM BROOKS. Second edition. 137 pages. Price 5s. 6d. net. 1929

The author claims that a full knowledge of the contents of this book is by itself sufficient for the purpose of answering all questions normally asked.

The Articled Clerk's Cram Book. By W. S. CHANEY, Solicitor, *(John Mackrell Prizeman).* 794 pages. Price 17s. 6d. net. 1932

A collection of Notes on the various subjects which come within the purview of the Solicitor's Final and Honours Examinations. While it is thought that a knowledge of its contents would in some cases probably suffice to enable a Student to answer sufficient questions to secure a pass, it is only intended as Notes on the general principles of the various subjects covered, and spaces have been left to enable the Student to add to these Notes as occasion offers.

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This book tells you what are the best books to read, how and when to read them, gives test questions to be answered at the various stages of reading and a set of questions and answers. Even if you are being coached, you will find many useful hints and much sound advice in it.

A New Guide to the Bar. Containing the Regulations and Examination Papers. Sixth Edition. By M. GARSIA, Barrister-at-Law. 130 pages. Price 5s. net. 1928

A Guide to the Legal Profession and London LL.B. Containing the latest Regulations for the Bar and articled clerks. With a detailed description of all current Students' Law Books, and suggested courses of reading. 99 pages. Price 3s. 6d. net. 1928

EXECUTORS.

WALKER'S Compendium of the Law relating to Executors and Administrators. Sixth Edition, embodying the effect of the Acts of 1925. By S. E. WILLIAMS, of Lincoln's Inn, Barrister-at-Law. 386 pages. Price £1 5s. net. 1926

"We highly approve of Mr. Walker's arrangement. . . . We can commend it as bearing on its face evidence of skilful and careful labour."—*Law Times.*

GARSIA'S Administration of Assets in a Nutshell. 3s. 6d. net. 1927

Excellent for final revision.

INCOME TAX.

NEWPORT on Income Tax Law and Practice. By C. A. Newport, F.C.R.A., Corporate Accountant. Fifth Edition, 336 pages. Price 10s. 6d. net. 1931

Written specially for examination students. It is illustrated throughout by examples, and has an appendix of questions and answers.

"This book in a way breaks new ground . . . The volume before us purposely assumes no prior knowledge, endeavours to make the position clear by simple practical illustrations, and in the words of its author, 'so far as possible, anything approaching the jargon almost inseparable from the subject has been either avoided or accompanied by intelligible explanations.'"—*Law Notes.*

INSURANCE LAW.

PORTER'S Laws of Insurance: Fire, Life, Accident, and Guarantee. Embodying Cases in the English, Scotch, Irish, American, Australian, New Zealand, and Canadian Courts. Seventh Edition. 505 pages. Price £1 12s. 6d. net. 1925

INTERNATIONAL LAW.

(See also Conflict of Laws.)

BENTWICH'S Students' Leading Cases and Statutes on International Law, arranged and edited with notes. By Norman Bentwich, Barrister-at-Law. With an Introductory Note by Professor L. Oppenheim. 247 pages. Price 12s. 6d. net. 1913

"This Case Book is admirable from every point of view, and may be specially recommended to be used by young students in conjunction with their lectures and their reading of text-books." —*Professor Oppenheim.*

COBBETT'S Cases and Opinions on International Law, and various points of English Law connected therewith, Collected and Digested from English and Foreign Reports, Official Documents, and other sources. With Notes containing the views of the Text-writers on the Topics referred to, Supplementary Cases, Treaties, and Statutes.

Vol. I. "Peace." Fifth Edition. By F. Temple Grey, Barrister-at-Law. 365 pages. Price 16s. net. 1931

Vol. II. "War and Neutrality." Fourth Edition. By H. H. L. Bellot, D.C.L. 671 pages. Price £1 5s. net. 1924

"The book is well arranged, the materials well selected, and the comments to the point. Much will be found in small space in this book."—*Law Journal.*

JURISPRUDENCE.

SALMOND'S Jurisprudence; or, Theory of the Law. By John W. Salmond, Barrister-at-Law. Eighth Edition. By C. A. W. Manning, Barrister-at-Law. 559 pages. Price £1 net. 1930

"Almost universally read among students of jurisprudence."—*Law Coach.*

HIBBERT'S Jurisprudence. By W. N. Hibbert, LL.D., Barrister-at-Law. Price 12s. 6d. net. 1932

A critical examination of the varying views of writers on this subject and a statement of the Author's own views which are the result of thirty-three years' teaching. Where necessary the historical aspect has been dealt with.

It is a book of the greatest assistance to examination students.

LEGAL HISTORY.

(See also Constitutional Law; Dictionary; Equity.)

POTTER'S Introduction to the History of English Law. By Harold Potter, LL.B. Second Edition. 260 pages. Price 10s. 6d. net. 1926

This scholarly work, while not professing completeness, lays before students fundamental principles with such detail as will not prevent them losing sight of the main thread of legal development. An excellent work for all examinations.

"Can be perused with interest and profit by the earnest student."—*Justice of the Peace.*

"Very thoughtful and well balanced."—*The Times.*

LEGAL MAXIMS.

(See also Dictionary.)

BROOM'S Selection of Legal Maxims, Classified and Illustrated. Ninth Edition. By W. J. BYRNE. 633 pages. Price £1 12s. 6d. net. 1924

The main idea of this work is to present, under the head of "Maxims," certain leading principles of English law, and to illustrate some of the ways in which those principles have been applied or limited, by reference to reported cases. The maxims are classified under the following divisions:—

Rules founded on Public Policy.
Rules of Legislative Policy.
Maxims relating to the Crown.
The Judicial Office.
The Mode of Administering Justice.
Rules of Logic.
Fundamental Legal Principles.
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This book is intended to enable the practitioner or student to acquire a working knowledge of Latin in the shortest possible time, and at the same time to become acquainted with the legal maxims which embody the fundamental rules of the common law.

COTTERELL'S Latin Maxims and Phrases. Literally translated, with explanatory notes. Intended for the use of students for all legal examinations. By J. N. COTTERELL, Solicitor. Third Edition. 82 pages. Price 5s. net.

LOCAL GOVERNMENT.

WRIGHT & HOBHOUSE'S Outline of Local Government and Local Taxation in England and Wales (excluding London). Seventh Edition. With Introduction and Tables of Local Taxation. 254 pages. Price 12s. 6d. net. 1929

Local Government—*continued.*

"The work gives within a very moderate compass a singularly clear and comprehensive account of our present system of local self-government, both in urban and rural districts. We are, indeed, not aware of any other work in which a similar view is given with equal completeness, accuracy, and lucidity." –*County Council Times.*

"Lucid, concise, and accurate to a degree which has never been surpassed."—*Justice of the Peace.*

JACOBS' Epitome of the Law relating to Public Health. By BERTRAM JACOBS, Barrister-at-Law. 191 pages. Price 7s. 6d. net. 1912
Specially written for students.

MASTER AND SERVANT.

GARSIA & FEATHERSTONE'S Law relating to Master and Servant in a Nutshell. 34 pages. Price 2s. 6d. net. 1925

"It covers the whole range of the law of Master and Servant, which is classified, digested and presented in a form well calculated for assimilation."—*Justice of the Peace.*

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